Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPORT AND ORDER AND
NOTICE OF PROPOSED RULEMAKING

Adopted: September 11, 2007 **Released: October 1, 2007**

Comment Date: 30 days after date of publication in the Federal Register
Reply Comment Date: 45 days after date of publication in the Federal Register

By the Commission: Chairman Martin and Commissioners Adelstein, Tate and McDowell issuing separate statements; Commissioner Copps approving in part, concurring in part and issuing a statement

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended ("Communications Act") generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators (the "exclusive contract prohibition").[1] In this *Order*, we find that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming, and accordingly, retain it again for five years, until October 5, 2012. In the *Order*, we decline to narrow the scope of the exclusive contract prohibition based on the popularity of the programming network, based on the competitive circumstances in individual geographic areas served by a

[1] 47 U.S.C. § 548(c)(2)(D).

cable operator, or by precluding certain competitive multichannel video programming distributors ("MVPDs")[2] from benefiting from the prohibition. We also decline to expand the exclusive contract prohibition to apply to non-cable-affiliated programming, and we again conclude that terrestrially delivered programming is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). In the *Notice of Proposed Rulemaking* ("*NPRM*"), we seek comment on revisions to the Commission's program access and retransmission consent rules and whether it may be appropriate to preclude the practice of programmers to tie desired programming with undesired programming. First, the Commission seeks comment on whether it can establish a procedure that would shorten the term of the five-year extension of the exclusive contract prohibition if, after two years (*i.e*., October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a Designated Market Area. Second, the *NPRM* seeks comment on whether it would be appropriate to extend the Commission's program access rules to all terrestrially delivered cable-affiliated programming pursuant to various provisions of the Communications Act. Third, we seek comment on whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a Direct Broadcast Satellite ("DBS") provider. Fourth, given the problems associated with programming tying arrangements, the *NPRM* seeks comment on whether it may be appropriate for the Commission to preclude such arrangements. Accordingly, the *NPRM* (i) seeks comment on how retransmission consent negotiations are impacted when broadcasters tie carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks; (ii) seeks comment on whether Section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, term, and conditions; and (iii) seeks comment on whether the Commission should require terrestrially delivered cable programming networks and programming networks affiliated with neither a cable operator nor a broadcaster to be offered on a stand-alone basis to all MVPDs at reasonable rates, term, and conditions. Fifth, the *NPRM* seeks comment on whether and how we should address additional program access concerns raised in this proceeding by small and rural MVPDs regarding allegedly onerous and unreasonable conditions imposed by some programmers for access to their content. In the *NPRM*, we also seek comment on whether to (i) establish a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of the complaint; and (ii) require parties to submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process.

2. Further, we modify our procedures for resolving program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding that expressly relies upon a document in asserting a defense include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a

[2] 47 U.S.C. § 522(13) ("multichannel video programming distributor" means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming"). The term "competitive MVPD" refers to MVPDs that compete with incumbent cable operators.

complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. We decline to (i) mandate electronic filings of pleadings at this time (but we note that parties currently may voluntarily submit electronic copies of their pleadings to staff via e-mail); (ii) adopt a more expedited pleading cycle for program access complaints; (iii) mandate weekly status conferences; (iv) shift resolution of program access complaints to the Enforcement Bureau; or (v) adopt mandatory arbitration.

II. BACKGROUND

A. Exclusive Contract Prohibition

3. In enacting the program access provisions, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress intended to encourage entry into the MVPD market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable competitors.[3] The 1992 Cable Act and its legislative history[4] reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration,[5] created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.[6] Congress concluded at that time that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, such as other cable systems, home satellite dish ("HSD") distributors, direct broadcast satellite ("DBS") providers, satellite master antenna television ("SMATV") systems, and wireless cable operators.[7]

4. When the Commission promulgated regulations implementing the program access provisions of Section 628,[8] it recognized that Congress placed a higher value on new competitive entry into the MVPD marketplace than on the continuation of exclusive distribution practices when such practices impede this entry.[9] Congress absolutely prohibited exclusive contracts for satellite cable programming or satellite broadcast programming[10] between vertically integrated programming vendors

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[3] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *See* H.R. Rep. No. 102-628 (1992); S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102-862 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231.

[5] Vertical integration means the combined ownership of cable systems and suppliers of cable programming.

[6] 1992 Cable Act § 2(a)(2).

[7] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365-67, ¶ 21 (1993) ("*First Report and Order*"), *recon.*, 10 FCC Rcd 1902 (1994), *further recon*., 10 FCC Rcd 3105 (1994).

[8] *See First Report and Order*, 8 FCC Rcd 3359 (1993).

[9] *See id.* at 3384, ¶ 63.

[10] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

and cable operators in areas unserved by cable,[11] and generally prohibited exclusive contracts within areas served by cable:

> with respect to distribution to persons in areas served by a cable operator, [the Commission shall] prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest.[12]

Congress recognized that, in areas served by cable, some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs.[13] Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "petition for exclusivity" to the Commission for approval.[14]

5. Congress directed that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[15] In October 2001, the Commission sought comment on this issue,[16] and ultimately concluded that the exclusive contract prohibition did continue to be "necessary."[17] The Commission therefore extended the prohibition for five years (*i.e.*, through October 5, 2007).[18] The Commission explained that the prohibition remained necessary because, based on marketplace conditions at the time, cable-affiliated programmers retained the ability and incentive to

[11] 47 U.S.C. § 548(c)(2)(C).

[12] 47 U.S.C. § 548(c)(2)(D); *see also* 47 C.F.R. § 76.1002(c)(2).

[13] 47 U.S.C. § 548(c)(2)(4). In determining whether an exclusive contract is in the public interest, Congress instructed the Commission to consider each of the following factors: (i) the effect of such exclusive contract on the development of competition in the local and national MVPD markets; (ii) the effect of such exclusive contract on competition from MVPD technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the MVPD market; and (v) the duration of the exclusive contract. *See id.*

[14] *See* 47 C.F.R. § 76.1002(c)(5).

[15] 47 U.S.C. § 548(c)(5).

[16] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001) ("*2001 Sunset NPRM*").

[17] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12153-54, ¶ 65 (2002) ("*2002 Extension Order*").

[18] *See id*.

withhold programming from unaffiliated MVPDs such that competition and diversity in the distribution of video programming would be impaired without the rule:[19]

> [t]he competitive landscape of the market for the distribution of multichannel video programming has changed for the better since 1992. The number of MVPDs that compete with cable and the number of subscribers served by those MVPDs have increased significantly. We find, however, that the concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace.[20]

6. When it extended the exclusive contract prohibition, the Commission also resolved a number of other critical issues raised by commenters with respect to Section 628(c)(5), such as (i) the definition of "necessary" as used in Section 628(c)(5);[21] (ii) whether the Commission can use its predictive judgment in assessing if the exclusive contract prohibition continues to be necessary;[22] (iii) whether extending the exclusive contract prohibition withstands an intermediate scrutiny test pursuant to First Amendment jurisprudence;[23] (iv) whether there exists a class of "must have" programming for which there are no readily available substitutes and, without access to which, competitive MVPDs would be limited in their ability to compete in the video distribution market;[24] (v) the impact of increased clustering and consolidation of cable systems on competition in the video distribution marketplace and the necessity of the exclusive contract prohibition;[25] (vi) the relevance of antitrust laws to the Commission's

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[19] *See id*. at 12125, ¶ 3.

[20] *See id*. at 12153-54, ¶ 65.

[21] *See id*. at 12128-30, ¶¶ 10-14 ("[W]e conclude that the exclusivity prohibition continues to be 'necessary' if, in the absence of the prohibition, competition and diversity would not be preserved and protected.") (footnotes omitted).

[22] *See id*. at 12130-31, ¶ 16 ("While specific factual evidence is necessary, it alone may not be sufficient to make that determination; we believe that the Commission may also rely on economic theory and its predictive judgment.") (footnotes omitted); *id*. at 12135-36, ¶ 25 ("[I]n determining whether to sunset the exclusivity prohibition, we will rely on the factual evidence available, economic theory and the Commission's predictive judgment of the direction in which the future public interest lies.").

[23] *See id*. at 12143, ¶ 45 n.138 ("Further, we reject AOLTW's argument that First Amendment concerns mandate sunset of the exclusivity prohibition. . . . The exclusivity prohibition was previously upheld in the face of a First Amendment challenge. . . . [A]s described herein, we believe the record fully supports our finding that vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace and diversity in the distribution of video programming preserved and protected.").

[24] *See id*. at 12139, ¶ 33 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this "must have" programming, their ability to retain subscribers would be jeopardized.").

[25] *See id*. at 12145, ¶ 47 ("We believe that clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."); *id*. at 12150-51, ¶ 58 ("[C]onsolidation within the industry since passage of the 1992 Act affords [cable] operators greater direct incentives to advantage their own system operations even at the cost of some immediate advantage in terms of foregone revenues from content distribution to competitors.").

assessment of whether to permit the exclusive contract prohibition to sunset;[26] (vii) the relevance of the impact of the exclusive contract prohibition on incentives to create programming;[27] (viii) whether terrestrially delivered programming falls within the exclusive contract prohibition in Section 628(c)(2)(D);[28] (ix) whether treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusive contract prohibition is consistent with the text and intent of Section 628(c)(2)(D);[29] and (x) whether other provisions of the Communications Act, such as Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B), are adequate substitutes for the protection afforded under Section 628(c)(2)(D).[30] No party sought reconsideration or other review of the Commission's decision to extend the exclusive contract prohibition or its conclusions on these other critical issues.

7. The Commission further provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[31] We issued the *Notice* in February 2007 to initiate this review.[32] Comments pertaining to the exclusive contract prohibition were filed by large incumbent cable operators,[33] new and established competitors to these large incumbent cable operators,[34] consumer groups,[35] and other individuals and entities interested in the exclusive contract prohibition.[36]

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[26] *See id*. at 12143, ¶ 45 n.138 ("By passing Section 628, Congress already determined that antitrust laws were not a viable alternative for achieving the government's goals in this instance.")

[27] *See id*. at 12152, ¶ 62 ("[I]n considering whether to retain the exclusivity prohibition, our primary focus should be on preserving and protecting diversity in the *distribution* of video programming.") (emphasis added).

[28] *See id*. at 12158, ¶ 73 ("[T]he Commission has concluded that . . . terrestrially delivered programming is 'outside of the direct coverage of Section 628(c).' We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion." (citing *DIRECTV, Inc. v. Comcast Corp. et al.,* 15 FCC Rcd 22802 (2000))).

[29] *See id*. at 12156, ¶ 69 ("We believe treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusivity prohibition is consistent with Section 628(c)(2)(D) and the definitions set forth in Sections 628(i)(1) and (3). We will therefore not narrow the scope of the exclusivity prohibition to only so-called essential programming services.") (footnote omitted).

[30] *See id*. at 12154, ¶ 65 n. 206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D).").

[31] *See id.* at 12161, ¶ 80.

[32] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252, 4252-53, ¶ 1 (2007) ("*Notice*").

[33] In their comments, large incumbent cable operators urge the Commission to allow the exclusive contract prohibition to sunset. This group of commenters is collectively referred to herein as "cable multiple system operators" or "cable MSOs." This group of commenters includes the following: Cablevision Systems Corp. ("Cablevision"); Comcast Corporation ("Comcast"); National Cable & Telecommunications Association ("NCTA"); and Time Warner Inc. ("Time Warner").

[34] In their comments, new and established competitors to the cable MSOs urge the Commission to allow the exclusive contract prohibition to continue. This group of commenters includes (i) established competitors (such as DBS operators); (ii) new competitors (such as wireline entrants, including telephone companies beginning to enter the video distribution market); and (iii) small and rural incumbent cable operators that assert that they do not have the means to invest in their own programming and thus stand to be harmed rather than benefit from sunset of the

(continued….)

B. Program Access Complaint Procedures

8. Section 628 of the Communications Act prohibits unfair methods of competition or unfair or deceptive practices that hinder or prevent any MVPD from providing satellite-delivered programming to consumers.[37] Section 628(b) provides:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[38]

Section 628, among other things, protects access to vertically integrated cable programming services by competing MVPDs in order to increase competition and diversity in the MVPD market and foster the development of competition to traditional cable systems.[39]

9. Parties aggrieved by conduct alleged to violate the program access provisions have the right to commence an adjudicatory proceeding before the Commission.[40] As instructed by Section 628(c), the Commission promulgated regulations implementing a program access complaint process.[41] The Commission determined that a streamlined program access complaint process, with limited discovery procedures and adjudication based on a complaint, answer, and reply, would provide the most flexible and

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exclusive contract prohibition. This group of commenters is collectively referred to herein as "competitive MVPDs." This group of commenters includes the following: American Cable Association ("ACA"); AT&T Inc. ("AT&T"); Broadband Service Providers Association ("BSPA"); Coalition for Competitive Access to Content ("CA2C"); DIRECTV, Inc. ("DIRECTV"); EATEL Video, LLC ("EATEL"); EchoStar Satellite L.L.C. ("EchoStar"); National Rural Telecommunications Cooperative ("NRTC"); National Telecommunications Cooperative Association ("NTCA"); Organization for the Promotion and Advancement of Small Telecommunications Companies and the Independent Telephone and Telecommunications Alliance ("OPASTCO/ITTA"); Qwest Communications International Inc. ("Qwest"); RCN Telecom Services, Inc. ("RCN"); The Rural Independent Competitive Alliance ("RICA"); SureWest Communications ("SureWest"); The United States Telecom Association ("USTelecom"); and Verizon.

[35] The Consumer Federation of America, Consumers Union, Free Press, Media Access Project, and Communications Workers of America (collectively, "Consumer Groups") argue that the exclusive contract prohibition remains essential to promoting video competition and that the Commission should therefore extend the exclusive contract prohibition for at least an additional five years. *See* Consumer Groups Reply Comments at 7.

[36] Other parties that filed comments include Carol L. Carlson; The Walt Disney Company, CBS Corporation, Fox Entertainment Group, and NBC Universal (collectively, the "Broadcast Networks"); and Office of Advocacy of the United States Small Business Administration ("SBA Advocacy Office").

[37] 47 U.S.C. § 548.

[38] *Id.* § 548(b). As part of the Telecommunications Act of 1996, Congress expanded program access protection to include common carriers and their affiliates that provide video programming by any means directly to subscribers, and to satellite cable programming vendors in which a common carrier has an attributable interest. *See id.* § 548(j).

[39] *Id.* § 548(a).

[40] *Id.* § 548(d).

[41] *See First Report and Order,* 8 FCC Rcd 3359 (1993).

expeditious means of enforcing the anti-discrimination program access provisions.[42] The Commission further addressed program access complaint process issues in response to a petition for rulemaking filed by Ameritech New Media, Inc.[43] The Commission resolved these and other issues in the *1998 Program Access Order*.[44]

10. In the *1998 Program Access Order*, the Commission affirmed its authority to impose damages on a case-by-case basis for program access violations and adopted guidelines for resolving program access disputes so that denial of programming cases, such as unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints, are resolved within five months of the submission of the complaint to the Commission and all other program access complaints, including price discrimination cases, are resolved within nine months of the submission of the complaint to the Commission. The Commission subsequently amended the program access rules as part of an overhaul of the Commission's pleading and complaint rules.[45]

11. In the *Notice*, in addition to seeking comment on extension of the exclusive contract prohibition, we sought comment on whether and how our procedures for resolving program access disputes under Section 628 should be modified.[46] We sought comment on the costs associated with the complaint process and whether the pre-filing notice, pleading requirements, evidentiary standards, timing, and potential remedies are appropriate and effective. We also sought comment on whether specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of program access complaints. We asked whether the program access complaint rules and procedures, including those governing discovery and protection of confidential information, are adequate. We also asked whether we should adopt alternative procedures or remedies such as mandatory standstill agreements or arbitration, as the Commission has done in recent mergers.[47]

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[42] *See id.* at 3416, ¶ 123.

[43] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 22840 (1997). Ameritech requested that the Commission amend its rules to provide time limits for the resolution of program access complaints; to provide program access litigants discovery as-of-right; and to impose damages for adjudicated program access violations. *Id*. at 22855-61, ¶¶ 37-49.

[44] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 (1998) ("*1998 Program Access Order*").

[45] *See 1998 Biennial Review - Part 76 Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418 (1999) ("*1998 Biennial Review*"); *recon. denied*, FCC 99-258, 1999 WL 766253 (rel. Sept. 29, 1999).

[46] *See Notice*, 22 FCC Rcd at 4259-60, ¶¶ 13-16.

[47] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8274-77, ¶¶ 156-65 (2006) ("*Adelphia Order*"); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 552-55, ¶¶ 172-79 (2004) ("*Hughes Order*").

III. DISCUSSION

A. Exclusive Contract Prohibition

12. Our analysis of whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming" proceeds in five parts. Based on this five-part analysis, we conclude as explained below that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming and, accordingly, retain it again for five years. First, we review the standard we must apply in determining whether to allow the exclusive contract prohibition to continue. Second, we examine the changes that have occurred in the video programming and distribution markets since 2002 when we last decided that the exclusive contract prohibition continued to be necessary to preserve and protect competition. Third, in light of the changes that have occurred in the programming and distribution market since 2002, we assess whether vertically integrated program suppliers today retain both the ability and incentive to favor their affiliated cable operators over nonaffiliated MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule. Fourth, we assess proposals presented by commenters to narrow the scope of the exclusive contract prohibition and to apply an exclusive contract prohibition to programming networks affiliated with non-cable MVPDs and to unaffiliated programming networks. Fifth, we consider the appropriate length of time for an extension of the exclusive contract prohibition. We also briefly address other issues raised by some small and rural MVPDs regarding program access issues other than the exclusive contract prohibition.

1. Standard of Review

13. Various cable MSOs repeat arguments made in response to the *2001 Sunset NPRM* that the Commission should construe the term "necessary" as used in Section 628(c)(5) as requiring the exclusive contract prohibition to be "indispensable" or "essential" to prevent harm to competition.[48] In the *2002 Extension Order*, the Commission explained that the term "necessary" has been interpreted differently depending on the statutory context.[49] In some cases, courts have interpreted the term to mean "useful," "convenient," or "appropriate"[50] while in other contexts courts have interpreted the term in a more restrictive sense to mean "indispensable" or "essential."[51] Consistent with judicial precedent, the

[48] *See* Cablevision Comments at 6; Comcast Comments at 5 n.4.

[49] *See 2002 Extension Order*, 17 FCC Rcd at 12129-30, ¶ 14.

[50] *See id*. at 12129, ¶ 14 n.30 (citing *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 377-78 (1946) (state legislation "invalid if it unduly burdens commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplishing a permitted purpose"); *Armour & Co. v. Wantouk*, 323 U.S. 126, 129-30 (1944) (term "necessary" in the Fair Labor Standards Act, in context, means reasonably necessary to production, and not "indispensable," "essential," or "vital"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (term "necessary" in the "necessary and proper" clause of the U.S. Constitution means "convenient, or useful," and does not limit congressional power to the "most direct and simple" means available); *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (term "necessary" in the National Bank Act means "convenient" or "useful")). *See also* AT&T Reply Comments at 3 n.4 (citing *Cellco Partnership v FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004) (noting that "necessary" does not always mean "indispensable" or "essential"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390-95 (3d Cir. 2004) (upholding a standard under which "necessary" means "convenient, useful, or helpful"), *cert. denied*, 545 U.S. 1123 (2005)).

[51] *See id*. at 12129, ¶ 14 n.31 (citing *Kirschbaum v. Arsenal Building Corp.*, 316 U.S. 517, 525-26 (1942) (term "necessary" in the Fair Labor Standards Act means "indispensable" and "essential")). *See also* Cablevision (continued….)

Commission construed the term "necessary" in its statutory context[52] and determined that the exclusive contract prohibition continues to be "necessary" if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.[53] We find no basis to revisit the conclusions reached in the *2002 Extension Order*, which, we note, were never challenged. We continue to believe that Section 628(c)(5), when construed in its statutory context, requires the exclusive contract prohibition to be extended if we find that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.

14. We disagree with Cablevision to the extent it argues that the Commission must rely exclusively on specific factual evidence and cannot use its predictive judgment in assessing whether the exclusive contract prohibition continues to be "necessary" to preserve and protect competition and diversity in the distribution of video programming.[54] Rather, as the Commission concluded in the *2002 Extension Order*, while specific factual evidence is a necessary part of our analysis, it may not be sufficient in order for us to make a reasoned determination. Indeed, because the exclusive contract prohibition has been in effect since 1992, it is difficult to obtain specific factual evidence of the impact on competition in the video distribution market if the prohibition were lifted.[55] Accordingly, we continue to believe that we can also rely on economic theory and predictive judgment in addition to specific factual evidence in reaching our decision concerning the continued need for the exclusive contract prohibition.

15. We find that there is no statutory bar to a second extension of the exclusive contract prohibition. Cablevision claims that Section 628(c)(5) requires the Commission to conduct its review of the exclusive contract prohibition only once.[56] There is nothing in the statute, however, that limits the Commission to a single review. Nor does Section 628(c)(5) specify a time period for how long the prohibition must continue in the event the Commission finds a continuing need for the prohibition. Rather, it was left to the Commission's discretion to prescribe the period of any such extension.[57] Establishing a fixed date for sunset of the prohibition without conducting a further proceeding to determine whether the prohibition is still "necessary to preserve and protect competition and diversity in the distribution of video programming" would not be consistent with congressional intent.[58] The

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Comments at 6 n.16; Comcast Comments at 5 n.4 (citing *AT&T Corp. v. Iowa Utils. Bd.* , 525 U.S. 366, 388-90 (1999); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000)).

[52] *See 2002 Extension Order,* 17 FCC Rcd at 12130, ¶ 14 n.32 (citing *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (statute must be read as a whole, since the meaning of statutory language, plain or not, depends on context)).

[53] *See 2002 Extension Order,* 17 FCC Rcd at 12129-30, ¶ 14.

[54] *See* Cablevision Comments at 7.

[55] *See 2002 Extension Order,* 17 FCC Rcd at 12135-36, ¶ 25; s*ee also* Verizon Comments at 3 (noting that it has not faced difficulty in obtaining satellite-delivered vertically integrated programming while the exclusive contract prohibition is in effect but that it expects the situation to change if the prohibition were allowed to sunset). We note, however, that for vertically integrated programming that is delivered terrestrially and therefore is beyond the scope of Section 628(c), there is specific factual evidence that cable operators have withheld this programming from competitors and that such withholding has had a material adverse impact on competition in the video distribution market. *See infra* Section III.A.3.b; *see also* AT&T Comments at 4; BSPA Comments at 17; CA2C Comments at 17; RICA Comments at 5; SureWest Comments at 5-6; EchoStar Reply Comments at 16-17.

[56] *See* Cablevision Comments at n.13 (citing 47 U.S.C. § 548(c)(5) ("The prohibition . . . shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary . . . .")).

[57] *See 2002 Extension Order,* 17 FCC Rcd at 12159-60, ¶ 77.

[58] *See id*. at 12160, ¶ 78; *see* AT&T Reply Comments at 13 n.50; EchoStar Reply Comments at 13 n.22.

Commission thus concluded in the *2002 Extension Order* that the adoption of a five-year extension was conditioned on an additional review during the last year of this extension.[59] We note that neither Cablevision nor any other commenter challenged the Commission's decision in the *2002 Extension Order* to conduct a further review of the exclusive contract prohibition.

2. Status of the MVPD Market: 2002-2007

16. We examine below the changes that have occurred in the programming and distribution markets since 2002 when the Commission last reviewed whether the exclusive contract prohibition continued to be necessary to preserve and protect competition. As discussed below, the markets for both programming and distribution reflect some pro-competitive trends since 2002: (i) an increase in programming networks; (ii) a decrease in the percentage of popular national and regional networks that are affiliated with cable operators; and (iii) an increase in the market penetration of MVPDs that compete with incumbent cable operators.[60] As discussed in Section III.A.3 below, however, we conclude that, even with these developments in the programming and distribution markets, the concerns upon which Congress based the program access provisions persist in the marketplace, and thus we find the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

17. *Satellite-Delivered National Programming Networks*. The number of satellite-delivered national programming networks available to MVPDs has increased by 237 since 2002, from 294 networks[61] to 531 networks.[62] This amounts to an eighty percent increase in satellite-delivered national programming networks available to MVPDs.

18. *Vertically Integrated Satellite-Delivered National Programming Networks*. The number of satellite-delivered national programming networks that are vertically integrated with cable operators has increased by twelve since 2002, from 104 networks[63] to 116 networks.[64] The percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has declined since 2002, from 35 percent[65] to 22 percent.[66] EchoStar argues that, if international and non-

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[59] *See 2002 Extension Order,* 17 FCC Rcd at 12161, ¶ 80.

[60] For the most part, the data noted herein comes from our *12th Annual Report* on video competition, which reflects data on the video distribution and programming markets as of June 2005. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) ("*12th Annual Report*"). To the extent indicated, we also note more recent data and significant changes since the *12th Annual Report* which were provided by commenters.

[61] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, 1309-10, ¶ 157 (2002) ("*8th Annual Report*")).

[62] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); USTelecom Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[63] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

[64] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*.

[65] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

English programming is excluded, then the percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has only declined from 36 percent to 34 percent since 2002.[67] Comcast contends that, if the vertically integrated iN DEMAND pay-per-view network is considered as a single network rather than sixty separate networks, then the percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators is as low as 13.5 percent.[68]

19. The amount of the most popular programming that is vertically integrated with cable operators has declined slightly since 2002. While nine of the Top 20 (45 percent) satellite-delivered national programming networks (as ranked by subscribership) were vertically integrated in 2002 when the Commission last reviewed the exclusive contract prohibition,[69] commenters state that this number has decreased to seven (35 percent): The Discovery Channel, CNN, TNT, TBS, TLC, Headline News, and Cartoon Network.[70] As discussed below, we find that this number has decreased to six.[71] EchoStar notes that four cable-affiliated networks are among the Top 10 networks as ranked by subscribership, the same number as in 2002.[72] AT&T notes further that of the 91 non-premium cable programming networks with at least 20 million subscribers, 33 networks (or 36 percent) are affiliated with cable operators.[73] While seven of the Top 20 (35 percent) satellite-delivered national programming networks (as ranked by prime time ratings) were vertically integrated in 2002,[74] commenters state that this number has decreased to four

(Continued from previous page)
[66] *See 12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21 and 2575, ¶ 157. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 19 and 28 n.100 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); NCTA Comments at 5; Verizon Comments at 8 (citing *12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21).

[67] *See* EchoStar Comments at 9-10. Verizon notes that approximately 32 percent of the more than 250 regional and national networks that comprise Verizon's FiOS TV service are vertically integrated with incumbent video providers. *See* Verizon Comments at 8.

[68] Cable MSOs argue that the higher percentage (22 percent) calculated by the Commission in the *12th Annual Report* is overstated because the Commission considered the iN DEMAND pay-per-view network as if it were sixty separate networks. *See* Comcast Comments at 12 n.36; NCTA Comments at 5 n.12; Comcast Reply Comments at 9 n.21.

[69] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1363, Table D-6).

[70] *See 12th Annual Report*, 21 FCC Rcd at 2578-79, ¶ 163 and 2654, Table C-5. While the *12th Annual Report* does not list Cartoon Network among the Top 20 networks as ranked by subscribership, AT&T notes data as of December 2006 that lists Cartoon Network among the Top 20. *See* AT&T Comments at 12 n.22 (citing "Top Cable Program Networks – as of December 2006," available at http://www.ncta.com/ContentView.aspx?contentId=74 (citing Kagan Research, LLC, "Cable Program Investor," Jan. 31, 2007) (last visited August 6, 2007)).

[71] *See infra* ¶ 37. These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News. *See* Kagan Research, LLC, *Network Census: June 30*; *Cable Program Investor* (July 28, 2006) at 11.

[72] *See* EchoStar Comments at 6 (citing *8th Annual Report*, 17 FCC Rcd at 1363, Table D-6 and *12th Annual Report*, 21 FCC Rcd at 2654, Table C-5). These networks are The Discovery Channel, CNN, TNT, and TBS. *See 12th Annual Report*, 21 FCC Rcd at 2654, Table C-5.

[73] *See* AT&T Comments at 12-13 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 97-519 (2007)).

[74] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364, Table D-7).

of the Top 20 (20 percent): TNT, TBS, The Discovery Channel, and Cartoon Network.[75] As discussed below, we find that this number has remained the same at seven.[76] Cablevision states that (i) less than one-third of the forty most-popular national programming networks as ranked by prime-time ratings are affiliated with cable operators; and (ii) only three cable-affiliated networks have an average prime-time rating above 1.0.[77] AT&T notes that (i) TNT has remained the number one prime-time rated cable network for every year since 2002;[78] and (ii) as ranked by all-day ratings, five cable-affiliated networks are among the Top 20, including two of the top three: TNT (ranked number two); Cartoon Network (ranked number three); TBS (ranked number seven); CNN (ranked number nineteen); and The Discovery Channel (ranked number twenty).[79]

20. Only the largest cable MSOs tend to own vertically integrated programming.[80] In the *2002 Extension Order*, the Commission noted that all vertically integrated programming was attributable to five cable operators, four of which were among the seven largest cable MSOs.[81] Today, all vertically integrated programming is attributable to five cable operators, all of which are among the six largest cable MSOs: Comcast, Time Warner, Cox, Cablevision, and Advance/Newhouse.[82]

21. *Regional Programming Networks*. The number of regional programming networks available to MVPDs has increased by sixteen since 2002, from 80 networks[83] to 96 networks.[84] This amounts to a 20 percent increase since 2002 in regional programming networks available to MVPDs. The

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[75] *See 12th Annual Report*, 21 FCC Rcd at 2579, ¶ 164 and 2655, Table C-6. In the *2002 Extension Order*, the Commission noted data from the *8th Annual Report*, which listed the Top 20 cable networks as ranked by prime time ratings. *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364, Table D-7). The *12th Annual Report* lists the Top 15 cable networks as ranked by prime time ratings, rather than the Top 20. *See 12th Annual Report*, 21 FCC Rcd at 2579, ¶ 164 and 2655, Table C-6. While the *12th Annual Report* does not list Cartoon Network among the Top 15 networks as ranked by prime time ratings, AT&T cites recent data indicating that Cartoon Network is still among the Top 20. *See* AT&T Reply Comments at 7 n.22 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 50 (2007)).

[76] These networks are TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel. *See* Nielsen Media Research, *Top 50 Cable Networks Primetime* (June 2006).

[77] *See* Cablevision Comments at 2-3 (citing Kagan Research LLC, *Economics of Basic Cable Networks* at 50 (2006)); Cablevision Reply Comments at 9 (same).

[78] *See* AT&T Reply Comments at 7 (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 50 (2007)).

[79] *See id*. (citing Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 51-52 (2007)).

[80] *See 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18.

[81] *See id*.

[82] *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[83] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[84] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* Cablevision Comments at 22 n.75 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166); EchoStar Comments at 6 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166); Verizon Comments at 9-10 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22).

number of regional sports networks ("RSNs") has increased by approximately 36 percent since 2002, from 28 networks[85] to 39 networks, by some estimates.[86]

22. *Vertically Integrated Regional Programming Networks*. The number of regional programming networks that are vertically integrated with cable operators has increased by five since 2002, from 39 networks[87] to 44 networks.[88] The percentage of all regional programming networks that are vertically integrated with cable operators, however, has declined slightly since 2002, from 49 percent[89] to 46 percent.[90] The number of RSNs that are vertically integrated with cable operators has decreased by six since 2002, from 24 networks[91] to 18 networks, by some estimates.[92] The percentage of all RSNs that are vertically integrated has declined since 2002, from 86 percent[93] to approximately 46 percent.[94]

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[85] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[86] We note that, according to the Commission's most recent annual competition report, there were 37 RSNs as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. More recent data indicates that there are now 39 RSNs. *See* Cablevision Comments at 23 n.80 (stating that the *12th Annual Report* did not include the Mid-Atlantic Sports Network ("MASN"), an RSN that is not affiliated with cable operators); Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York, an RSN affiliated with Comcast).

[87] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[88] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* EchoStar Reply Comments at 11-12 n.19 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166).

[89] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[90] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166. Commenters do not provide data indicating that this information has changed significantly since the *12th Annual Report*. *See* USTelecom Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2579-80, ¶ 166). Verizon states that eighty percent of the regional networks it offers as part of FiOS TV are vertically integrated with cable operators. *See* Verizon Comments at 9.

[91] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[92] We note that, according to the Commission's most recent annual competition report, there were 17 vertically integrated RSNs as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. More recent data indicates that there are now 18 vertically integrated RSNs. *See* Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York, an RSN affiliated with Comcast, thereby increasing the number of vertically integrated RSNs to 18).

[93] *See 2002 Extension Order,* 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56, Table D-3).

[94] We note that, according to the Commission's most recent annual competition report, 45.9 percent of RSNs were vertically integrated as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183. If the unaffiliated MASN and the cable-affiliated SportsNet New York are included, then 18 out of 39 RSNs, or 46.1 percent, are vertically integrated. *See* Cablevision Comments at 23 n.80 (stating that the *12th Annual Report* did not include MASN); Verizon Comments at 10 n.16 (stating that the *12th Annual Report* did not include SportsNet New York). Comcast notes that it is affiliated with eight regional programming networks that show some sports programming: Comcast Sports Southeast; Comcast SportsNet Philadelphia; Comcast SportsNet Mid-Atlantic; (continued….)

23. *MVPD Market*. Since the Commission last examined the exclusive contract prohibition in 2002, the percentage of MVPD subscribers receiving their video programming from a cable operator has declined from 78 percent[95] to 67 percent, by some estimates.[96] The number of cable subscribers has declined by 3.4 million since 2002, from 69 million[97] to 65.4 million.[98] During this same period, the percentage of MVPD subscribers receiving their video programming from a DBS operator has increased from 18 percent[99] to over 30 percent, by some estimates.[100] The number of DBS subscribers has increased by 11.6 million since 2002, from 18 million[101] to 29.6 million, by some estimates.[102]

24. A significant development since 2002 is the emergence of video services offered by telephone companies, including AT&T, Qwest, and Verizon. As of the end of the second quarter of 2007, AT&T's U-Verse fiber-based video and Internet service passed over 4 million households.[103] AT&T also recently announced that its U-Verse video service has more than 100,000 customers.[104] Qwest has

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Comcast SportsNet Chicago; Comcast SportsNet West; SportsNet New York; Fox Sports New England; and Comcast Local (Detroit). *See* Comcast Comments at 13 n.39.

[95] *See 2002 Extension Order,* 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247, ¶ 5).

[96] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a cable operator was 78.11 percent as of June 2001 and 69.41 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1338, Table C-1 (78.11 percent) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (69.41 percent). More recent data indicates that the portion of MVPD subscribers served by cable operators is now approximately 67 percent. *See* Cablevision Comments at 2 (stating that cable's market share is 67 percent); Comcast Comments at 8 (stating that cable's market share is 67.8 percent as of the end of 2006); NCTA Comments at 4 (stating that cable's market share is 66.9 percent).

[97] *See 2002 Extension Order,* 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247, ¶ 7).

[98] *See 12th Annual Report*, 21 FCC Rcd at 2507, ¶ 10 and 2617, Table B-1; *see also* CA2C Comments at 5 (stating that there were 65.6 million cable subscribers as of December 2006).

[99] *See 2002 Extension Order,* 17 FCC Rcd at 12134, ¶ 23 (citing *8th Annual Report*, 17 FCC Rcd at 1338, Table C-1).

[100] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a DBS operator was 18.2 percent as of June 2001 and 27.72 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1388, Table C-1 (18.2 percent) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (27.72 percent). More recent data indicates that the portion of MVPD subscribers served by DBS operators is now over 30 percent. *See* Letter from Stephanie L. Podey, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 06-189 (June 13, 2007), Attachment at 1 (stating that DBS operators have an over 30 percent share of the MVPD market); *see also* NCTA Comments at 6 (same); Time Warner Reply Comments at 1 (same).

[101] *See 2002 Extension Order,* 17 FCC Rcd at 12134, ¶ 23.

[102] We note that, according to the Commission's annual competition reports, the number of MVPD subscribers receiving their video programming from a DBS operator was 16.07 million as of June 2001 and 26.12 million as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1338, Table C-1 (16.07 million) *with 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1 (26.12 million). More recent data indicates that the number of DBS subscribers is now 29.6 million. *See* Letter from Stephanie L. Podey, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 06-189 (June 13, 2007), Attachment at 1 (stating that, as of March 31, 2007, DIRECTV had 16.19 million subscribers and EchoStar had 13.42 million subscribers)*; see also* Cablevision Comments at 12 (stating that DIRECTV has 16 million subscribers and EchoStar has 13.1 million subscribers).

[103] *See* Media Kits: AT&T U-Verse, http://www.att.com/gen/press-room?pid=5838 (last visited Sept. 4, 2007).

[104] *See* More Than 100,000 Customers Choose AT&T U-verse Over Cable, http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24309 (last visited Sept. 7, 2007).

twenty-one cable franchises and provides nearly 60,000 subscribers with multichannel video service in Arizona, Colorado, Nebraska, and Utah.[105] Verizon, which introduced its fiber-based FiOS TV service in September 2005, had 515,000 video subscribers at the end of the second quarter of 2007.[106] Verizon's FiOS TV was available for sale to nearly 3.9 million premises in nearly 500 communities in 12 states as of the end of the second quarter of 2007.[107] Other wireline Broadband Service Providers ("BSPs") also offer video services in competition with cable operators, including RCN, WideOpenWest, Knology, and Grande.[108] Some wireline entrants cite a 2004 Government Accountability Office ("GAO") Report which concludes that wireline video entry provides more price discipline to cable than DBS and is more likely to cause cable operators to enhance their own services and to improve customer service.[109] In response, cable MSOs argue that wireline entry does not have a greater impact on cable prices than DBS entry.[110] Despite the significant investments made in competitive wireline networks, AT&T notes NCTA's estimate that wireline entrants have no more than 1.9 percent of all MVPD subscribers.[111]

25. The cable industry also cites other potential sources of video competition, such as SMATV systems,[112] providers of video on the Internet (such as YouTube, Google, and Akimbo),[113] over-the-air broadcast television,[114] DVDs and videotape purchases and rentals,[115] municipal and non-municipal utilities,[116] and providers of mobile video services.[117] Comcast also argues that in every

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[105] *See* Qwest Comments at 1 n.2.

[106] *See* Verizon Posts Strong 2Q 2007 Results Highlighted by Gains in Earnings, Consolidated Margins and Cash Flows, http://newscenter.verizon.com/press-releases/verizon/2007/verizon-posts-strong-2q-2007.html (last visited Sept. 4, 2007).

[107] *See id*.

[108] *See 12th Annual Report*, 21 FCC Rcd at 2549-50, ¶¶ 89-90.

[109] *See* BSPA Comments at 3 (citing Government Accountability Office ("GAO"), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004)); *see also* AT&T Comments at 3; CA2C Comments at 8 (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 21 FCC Rcd 15087, 15091 (2006) ("*2006 Cable Price Report*")); Qwest Comments at 5-6; Verizon Reply Comments at 7-8.

[110] *See* Comcast Reply Comments at 11. Comcast claims that the GAO Report cited by competitive MVPDs is deficient in significant respects. *Id.* NCTA cites a previous study which it claims demonstrate that lower prices are the result of anomalous circumstances not relevant to wireline entry. *See* NCTA Reply Comments at 5 (citing Reply Comments of NCTA, MB Docket No. 04-227 (August 25, 2004) (attaching Steven S. Wildman, "Assessing the Policy Implications of Overbuild Competition")); *see also* Comcast Reply Comments at 10-12.

[111] *See* AT&T Comments at 4 (citing NCTA Comments, MB Docket No. 06-189 (November 29, 2006) at 9).

[112] *See* Cablevision Comments at 13 (citing *12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130) and Appendix A at A-11.

[113] *See* Cablevision Comments at 14, 21 (citing *12th Annual Report*, 21 FCC Rcd at 2567-68, ¶ 138) and Appendix A at A-12 - A-13; Comcast Comments at 8-11. Cable MSOs also note that some popular programs are available online in their entirety and that some networks are developing original content for the Internet. *See* Cablevision Comments at Appendix A at A-12 - A -13; Comcast Comments at 10.

[114] *See* Cablevision Comments at 15; Comcast Comments at 9.

[115] *See* Cablevision Comments at 15; Comcast Comments at 9.

[116] *See* Cablevision Comments at 13-14 and Appendix A at A-10, A-18.

[117] *See* Cablevision Comments, Appendix A at A-14 - A-18; Comcast Comments at 9.

community, consumers can choose from a minimum of three MVPDs, and states that in many communities a fourth or fifth MVPD is available or will be soon.[118] Cablevision states that DIRECTV and EchoStar have at least double the number of subscribers of every cable MSO, with the exception of Time Warner and Comcast.[119] Comcast asserts that the competition that exists today far exceeds that which existed three years ago when the Commission concluded that "[T]he vast majority of Americans enjoy more choice, more programming and more services than any time in history."[120]

26. Commenters in favor of extending the prohibition state that the figures cited by the cable industry are misleading. EchoStar claims that national DBS penetration figures obscure the extent of competition on a local or regional basis where DBS penetration is much lower than the national average.[121] While the number of DBS subscribers has increased by 11.6 million since the *2002 Extension Order*, CA2C notes that cable subscribership during the same period decreased by less than one million, demonstrating that cable operators have maintained their position in the market.[122] Some competitive MVPDs argue that the continued ability of cable operators to raise prices in excess of inflation demonstrates the lack of competition in the video marketplace.[123] Competitive MVPDs also assert that barriers in the MVPD market still persist, as demonstrated by the Commission's efforts to promote greater competition.[124] CA2C notes that the Commission in its decision on cable franchising reform found that in the vast majority of communities around the country, "cable competition simply does not exist."[125] Some competitive MVPDs disagree with the assertion by the cable industry that mobile video, Internet video, and DVDs are substitutes for cable television.[126] Moreover, competitive MVPDs state that only 2.9 percent of MVPD subscribers receive service from an alternative provider to cable or DBS.[127]

27. *Consolidation of the Cable Industry*. The cable industry has continued to consolidate since 2002. During this period, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased from 48 percent[128] to between 53 and 60 percent, by some estimates, after taking into account the recent

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[118] *See* Comcast Comments at 6-7.

[119] *See* Cablevision Comments, Appendix A at A-1.

[120] *See* Comcast Comments at 6 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 4 (2004)).

[121] *See* EchoStar Reply Comments at 4-5 (stating that in some major markets, cable's market share is above 80 percent, and noting that the two DBS operators have only a collective market share of 15 percent in Cablevision's market areas).

[122] *See* CA2C Comments at 5; *see also* AT&T Comments 3-4; USTelecom Comments at 4.

[123] *See* CA2C Comments at 7 (stating that annual cable rate increases have been more than double the general rate of inflation in most markets); *see also* Consumer Groups Reply Comments at 2.

[124] *See* CA2C Comments at 6 (citing *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) ("*Local Franchising Report and Order*"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007) ("*MDU Access NPRM*")); USTelecom Comments at 3.

[125] *See* CA2C Comments at 5 n.7 (citing *Local Franchising Report and Order*, 22 FCC Rcd at 5110, ¶ 19).

[126] *See* AT&T Reply Comments at 11; EchoStar Reply Comments at 6 n.8; RCN Reply Comments at 4-5.

[127] *See* USTelecom Comments at 10 (citing *12th Annual Report*, 21 FCC Rcd at 2506-07, ¶ 8).

[128] *See 2002 Extension Order,* 17 FCC Rcd at 12133, ¶ 21(citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.[129] Moreover, the percentage of MVPD subscribers receiving their video programming from one of the four largest *vertically integrated* cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased significantly since 2002, from 34 percent[130] to between 54 and 56.75 percent, by some estimates.[131] Thus, as EchoStar notes, while the market share of small-to-medium sized, non-vertically integrated cable operators has declined, the market share of the large vertically integrated cable operators has increased since 2002.[132] Verizon notes that, in 2002, only three of the largest six cable operators owned satellite programming networks, whereas today five of the largest six cable operators own satellite programming networks.[133]

28. *Clustering of Cable Systems*. The amount of regional clustering of cable systems has remained significant.[134] The percentage of cable subscribers that are served by systems that are part of

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[129] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs was 47.67 percent as of June 2001 and 47.78 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1341, Table C-3 (47.67 percent) *with 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3 (47.78 percent). More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased to between 53 and 60 percent. *See* Verizon Comments at 11 (calculating a percentage of 53 percent by adding the percentage of subscribers served by Adelphia (5.50 percent) to the percentage of subscribers served by Comcast (22.99 percent), Time Warner (11.69 percent), Cox (6.73 percent), and Charter (6.37 percent), as those figures are stated in the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3)); USTelecom Comments at 9 (calculating this percentage using market share figures for Cox (6.73 percent) and Charter (6.37 percent) from the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3) and for Comcast (28.7 percent) and Time Warner (17.9 percent) from the *Adelphia Order,* 21 FCC Rcd at 8206, ¶ 2).

[130] *See 2002 Extension Order,* 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

[131] We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs was 34.26 percent as of June 2001 and 44.63 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1341, Table C-3 (34.26 percent) *with 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3 (44.63 percent). More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased to between 54 and 56.75 percent. *See* EchoStar Comments at 5 (calculating a percentage of 56.75 percent using market share figures for Cox (6.73 percent) and Cablevision (3.22 percent) from the *12th Annual Report* (21 FCC Rcd at 2620, Table B-3) and for Comcast (28.90 percent) and Time Warner (17.9 percent) from the *Adelphia Order* (21 FCC Rcd at 8206, ¶ 2)); Cablevision Reply Comments at 10-11 n.36 (calculating a percentage of 54 percent taking into account an increase in the total number of MVPD households by 4.5 million since the *Adelphia Order* and Comcast's net loss of 600,000 subscribers arising from its Patriot Media and Insight Communications transaction announcements). Cablevision contends that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs is the same as in 2001. *See* Cablevision Reply Comments at 10-11 n.36.

[132] *See* EchoStar Reply Comments at 4-5.

[133] *See* Verizon Comments at 11-12 (citing *2002 Extension Order*, 17 FCC Rcd at 12131-32, ¶ 18 and *12th Annual Report*, 21 FCC Rcd at 2622-25, Table C-1 and 2644-49, Table C-3).

[134] Clustering refers to a strategy whereby cable MSOs concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. *See Adelphia Order*, 21 FCC Rcd at 8315, ¶ 264. This strategy is accomplished through purchases and sales of cable systems, or by system "swapping" among MSOs. *See id*.

regional clusters has increased since 2002, from 80 percent[135] to as much as 85 to 90 percent, by some estimates, taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.[136]

3. Ability and Incentive

29. Our analysis of whether the exclusive contract prohibition continues to be necessary requires us to assess whether, in the absence of the exclusive contract prohibition, vertically integrated programmers would have the ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs and, if so, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming.[137] As discussed below, we conclude that there are no good substitutes for some satellite-delivered vertically integrated programming and that such programming therefore remains necessary for viable competition in the video distribution market. Based on this finding, we conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule. Although we find some trends in the markets for both video programming and video distribution since 2002 that might decrease the incentive of vertically integrated programmers to withhold programming from competitive MVPDs, we also find some trends that increase their incentive to withhold programming, such as the increase in horizontal consolidation of the cable industry, the increase in cable clustering, and the recent emergence of new competitors. We also find specific factual evidence that, where the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers have withheld and continue to withhold programming from competitive MVPDs. We thus conclude that vertically integrated programmers continue to have the incentive to favor their affiliated cable operators over competitive MVPDs. Accordingly, we conclude that the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[138] We note, however, that Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant. While we conclude herein that market developments since 2002 were not sufficient to allow us to lift the exclusive contract prohibition at this time, there nevertheless may come a point when these developments will be sufficient to allow the prohibition to sunset. We caution competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming.

[135] *See 2002 Extension Order,* 17 FCC Rcd at 12133-34, ¶ 22 (citing *8th Annual Report*, 17 FCC Rcd at 1252, ¶ 14).

[136] We note that, according to the Commission's annual competition reports, the percentage of cable subscribers served by systems that are part of regional clusters was 80.4 percent as of 2000 and 77.9 percent as of 2004. *Compare 8th Annual Report*, 17 FCC Rcd at 1340, Table C-2 (stating that, as of 2000, 108 cable system clusters were serving 54.4 million subscribers, or 80.4 percent of cable subscribers) *with 12th Annual Report*, 21 FCC Rcd at 2619, Table B-2 (stating that, as of 2004, 118 cable system clusters were serving 51.5 million subscribers, or 78.7 percent of cable subscribers). More recent data indicates that the percentage of cable subscribers that are served by systems that are part of regional clusters has increased to between 85 and 90 percent. *See* Consumer Group Reply Comments at 4-5 (estimating that 85 to 90 percent of cable subscribers are currently served by regional clusters after taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia).

[137] *See 2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16.

[138] 47 U.S.C. § 548(c)(5).

a. Ability

30. As discussed in this section, we conclude that satellite-delivered vertically integrated programming remains programming for which there are often no good substitutes and that such programming is necessary for viable competition in the video distribution market. In the *2002 Extension Order*, the Commission determined that the question of whether satellite-delivered vertically integrated programmers retain the ability to favor their affiliated cable operators over nonaffiliated MVPDs requires us to assess whether satellite-delivered vertically integrated programming remains programming that is necessary to the viability of competitive MVPDs and for which there are often no good substitutes.[139] If we conclude that satellite-delivered vertically integrated programming remains necessary to maintain the competitiveness of MVPDs in the current market, then favoritism by satellite-delivered vertically integrated programmers of their affiliated cable operators over competitive MVPDs would impair competition and diversity in the distribution of video programming.[140] In assessing the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators to the detriment of competing MVPDs, we consider whether developments in the last five years have diminished the importance of satellite-delivered vertically integrated programming or have affected the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators over other MVPDs.[141]

31. Cable MSOs note that the number of satellite-delivered national programming networks available to MVPDs has increased from 294 in 2002[142] to 531 in 2005.[143] While the number of vertically integrated satellite-delivered national programming networks has increased by twelve since 2002, cable MSOs note that the percentage of all satellite-delivered national programming networks that are vertically integrated has declined from 35 percent in 2002 to between 13.5 percent and 22 percent at present.[144] Comcast notes that 57 percent of national programming networks were vertically integrated when the exclusive contract prohibition in the 1992 Cable Act was enacted.[145] Cablevision argues that with over 500 programming channels available and more than 80 percent of these channels unaffiliated with cable, it is implausible that competition would be harmed if competitive MVPDs were denied access to a cable-affiliated network.[146]

32. Competitive MVPDs counter that the decrease in the percentage of satellite-delivered national programming networks that are vertically integrated is meaningless because it is attributable to an increase in the number of total programming networks available, most of which they contend have minimal subscriber bases and are targeted towards niche markets.[147] The more salient fact, competitive MVPDs argue, is that cable MSOs still control essential "must have" programming and that access to this

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[139] *See id*. at 12135, ¶ 24.

[140] *See id*.

[141] *See id*.

[142] *See id.* at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157).

[143] *See 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157; *see also* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[144] *See supra* ¶ 18; *see also* Cablevision Comments at 19 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157); Comcast Comments at 12 (same); NCTA Comments at 5-6 (same).

[145] *See* Cablevision Comments at 19; Comcast Comments at 11-12; Comcast Reply Comments at 9.

[146] *See* Cablevision Reply Comments at 8.

[147] *See* CA2C Comments at 15; AT&T Reply Comments at 6-7; Verizon Reply Comments at 9.

programming remains key to the ability of competitive MVPDs to compete in the video distribution market.[148] They argue that it is not necessary for cable MSOs to control all essential programming to impact competition; rather, cable MSOs need only control certain programming that is "key to the decision by each major demographic group in choosing between alternate providers."[149] Numerous competitive MVPDs contend that, without access to such programming, their ability to compete will be compromised.[150]

33. With respect to regional programming, cable MSOs note that the number of regional programming networks, including RSNs, that are vertically integrated has declined since 2002.[151] With respect to non-sports regional networks, Cablevision notes that DBS providers carry few, if any, of these networks even though they are satellite-delivered and therefore subject to the program access requirements, including the exclusive contract prohibition.[152] Cablevision argues that this is consistent with the Commission's previous conclusion that the record in the *Adelphia* proceeding did not indicate that an MVPD's lack of access to regional non-sports programming would harm competition or consumers.[153] With respect to RSNs, cable MSOs note that the number of vertically integrated RSNs has decreased from twenty-four in 2002 to seventeen in 2005.[154] Moreover, Cablevision asserts that there are numerous substitutes for sports programming, such as unaffiliated team-owned and league-owned sports networks, sports content that is available over the Internet, and sports programming available from nearly every major broadcast network.[155] While DBS operators claim competitive harm from being unable to

[148] *See* ACA Comments at 4; AT&T Comments at 8; BSPA Comments at 4; CA2C Comments at 9, 14; DIRECTV Comments at 6-7; EATEL Video Comments at 4; EchoStar Comments at 2; NRTC Comments at 6-7; NTCA Comments at 1; OPASTCO and ITTA Comments at 5; Qwest Comments at 5-7; RCN Comments at 3; SureWest Comments at 2-4; USTelecom Comments at 12; Verizon at 9; Consumer Groups Reply Comments at 6; SureWest Reply Comments at 3.

[149] *See* CA2C Comments at 14; *see also* BSPA Comments at 4; DIRECTV Comments at 6-7.

[150] *See* EATEL Comments at 1 (arguing that sunset of the exclusive contract prohibition would "effectively destroy" its ability to offer service); EchoStar Comments at 9 (stating that access to programming will "make or break" the ability of new entrants to compete); NRTC Comments at 20 (stating that an MVPD cannot "operate successfully" if that system lacks access to cable-affiliated networks such as CNN, HBO, TNT, and The Discovery Channel); OPSATCO/ITAA at 4 (arguing that rural telephone companies that serve as MVPDs would "no longer be economically viable" if the exclusive contract prohibition were to sunset); RCN Comments at 4 (stating that competitive MVPDs will "confront serious problems retaining subscribers" if access to "must have" programming is denied); SureWest Comments at 2 (stating that it would not survive "without access to the most popular video content").

[151] *See supra* ¶ 22; *see also* Cablevision Comments at 23.

[152] *See* Cablevision Comments at 22.

[153] *See id*. at 22 (citing *Adelphia Order*, 21 FCC Rcd at 8279, ¶ 169).

[154] *But see supra* ¶ 22 (concluding that there are now eighteen vertically integrated RSNs); *see also* Cablevision Comments at 23 (citing *2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47; *12th Annual Report*, 21 FCC Rcd at 2586, ¶ 183).

[155] *See* Cablevision Comments at 4, 24 and Appendix B at 21-22. Cablevision also contends that the claimed "must have" status of RSN programming is refuted by the fact that it lost only 2.1 percent of its subscribers during 2002 when it was unable to carry the YES network. *See id*. at 24. In response, Verizon argues that the "loss of a few subscribers by an entrenched incumbent cable operator due to the unavailability of programming pales in competitive significance to the inability of a new entrant to attract subscribers in the first place because it cannot offer 'must have' programming offered by the entrenched cable incumbent." *See* Verizon Reply Comments at 10 n.28.

access the terrestrially delivered Comcast SportsNet Philadelphia, Cablevision notes that DBS market penetration in Philadelphia has in fact tripled from four percent in 2000 to twelve percent at the end of 2006.[156] Moreover, Cablevision claims that DBS market penetration in Philadelphia is higher than in other metropolitan areas (Hartford-New Haven, Providence, and Springfield) and comparable to Boston and Baltimore.[157] Cablevision also notes that the Commission concluded in the *Adelphia* proceeding that DIRECTV failed to demonstrate that lack of access to an RSN in San Diego had a statistically significant effect on its market penetration.[158]

34. Competitive MVPDs counter that the ability of vertically integrated programmers to disadvantage unaffiliated competitors is particularly acute for regional programming – particularly RSNs.[159] Competitive MVPDs argue that RSNs are "must have" programming and that there are no readily acceptable substitutes for such programming.[160] Competitive MVPDs cite the Commission's decision in the *Adelphia* proceeding that "programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."[161] Competitive MVPDs note that DBS market penetration in Philadelphia and San Diego drops almost in half due to the lack of access to RSNs as compared to other similar markets where they have access to RSNs.[162] In response to the argument of cable MSOs that there is sufficient non-cable-affiliated sports programming available, competitive MVPDs argue that, where one MVPD has access to the most popular local sports programming and a competing MVPD does not, the availability of other sports programming to the competing MVPD is largely irrelevant.[163]

35. Cablevision disputes that there is any cable programming that can be considered "must have" and states that no commenter has provided empirical evidence to demonstrate that certain cable programming is "must have."[164] Cablevision argues that every type of national programming network faces ample competition.[165] Moreover, Cablevision notes that some competitive MVPDs do not carry certain RSNs despite their claims that such programming is "must have."[166] In response, competitive

[156] *See* Cablevision Comments at 25; Cablevision Reply Comments at 12.

[157] *See* Cablevision Comments at 25; Cablevision Reply Comments at 12.

[158] *See* Cablevision Comments at 26 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 148).

[159] *See* AT&T Comments at 15-16; BSPA Comments at 6, 17; CA2C Comments at 17; EchoStar Comments at 4; NTCA Comments at 4; OPASTCO/ITAA Comments at 5-6; RCN Comments at 4, 9; RICA Comments at 5; SureWest Comments at 3; USTelecom Comments at 14-15; Verizon Comments at 9-10; AT&T Reply Comments at 4; EchoStar Reply Comments at 11-12.

[160] *See* ACA Comments at 6; NTCA Comments at 4; OPASTCO/ITTA Comments at 5-6; RCN Comments at 4, 9; Verizon Comments at 9; AT&T Reply Comments at 4-5.

[161] *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189.

[162] *See* AT&T Comments at 17-18; CA2C Comments at 9.

[163] *See* AT&T Reply Comments at 5; RCN Reply Comments at 8; Verizon Reply Comments at 10.

[164] *See* Cablevision Reply Comments at 2, 8-9; *see also* Time Warner Reply Comments at 13 n.23. Cablevision, however, has referred to certain broadcast programming as "must have" in another Commission proceeding. *See* Comments of Cablevision Systems Corp., MB Docket No. 03-124 (June 16, 2003) at 3, 13-14, 18, 28 (referring to the Fox broadcast network as "must have").

[165] *See* Cablevision Comments, Appendix B at 14.

[166] *See* Cablevision Reply Comments at 12 (stating that EchoStar declined to carry an RSN in Washington, D.C. (MASN) for two years, and that it still declines to carry an RSN serving New York City (YES)).

MVPDs cite the Commission's economic analysis in the *Adelphia* proceeding where it concluded that exclusive access of cable operators to RSNs reduces the number of DBS subscribers.[167] Cablevision states that the Commission's findings in the *Adelphia Order* were based on a flawed regression analysis, thus precluding the Commission from relying on that decision here.[168]

36. Competitive MVPDs argue that access to vertically integrated programming is particularly critical for recent entrants in the video distribution market, such as telephone companies that have begun to enter the market since we last reviewed the exclusive contract prohibition.[169] They argue that access to vertically integrated programming is as critical for these recent entrants as it was for DBS entrants in the early 1990s.[170] Cable MSOs counter that one class of recent entrant – telephone companies such as AT&T and Verizon -- have far more resources than the cable MSOs and, therefore, they do not need government assistance to compete.[171] Moreover, they assert that there is no indication that recent entrants are having trouble securing programming.[172] Some competitive MVPDs argue that "must have" programming is essential to offering a viable video service and, in turn, the ability to offer a viable video service is "linked intrinsically" to broadband deployment.[173] Accordingly, CA2C argues that extending the exclusive contract prohibition is supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[174]

37. *Discussion*. Despite some pro-competitive developments over the past five years, we find that access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable substitutes to the incumbent cable operator in the eyes of consumers. What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and

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[167] *See* Verizon Reply Comments at 10; *see also* EchoStar Reply Comments at 7-8. RCN also refers to surveys it conducted which determined that approximately 40 to 58 percent of subscribers would refuse to change MVPDs if the new MVPD did not carry local sports programming. *See* RCN Comments at 10 n.27. In response, Cablevision argues that (i) this survey is five years old; (ii) RCN provides no information on its survey methodology; and (iii) on its face, the survey indicates that up to 60 percent of subscribers are indifferent to local sports programming. *See* Cablevision Reply Comments at 12 n.41.

[168] *See* Cablevision Comments, Appendix B at 24-25.

[169] *See* AT&T Comments at 9; Qwest Comments at 5; USTelecom Comments at 4, 6; Verizon Comments at 3, 6-7; Verizon Reply Comments at 11.

[170] *See* AT&T Comments at 2; CA2C Comments at 12.

[171] *See* Cablevision Comments at 5 ("Cablevision faces competition from . . . Verizon and AT&T, whose market capitalizations are 10 and 25 times larger, respectively, than Cablevision's. Each of those entities has the ability to invest in its own programming, just as Cablevision did."); Comcast Comments at 20; Time Warner Reply Comments at 21.

[172] *See* Cablevision Comments at 13; Comcast Comments at 18-21; Comcast Reply Comments at 17-19.

[173] *See Local Franchising Report and Order*, 22 FCC Rcd at 5132-33, ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted); *see also* ACA Comments at 14; CA2C Comments at 19; OPASTCO/ITTA Comments at 2; USTelecom Comments at 6-7; CA2C Reply Comments at 10-11; Qwest Reply at 3.

[174] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note); *see also* CA2C Comments at 19; CA2C Reply Comments at 10-11.

protection of competition in the video distribution marketplace.[175] While there has been a decrease since 2002 in the percentage of the most popular programming networks that are vertically integrated, we find that the four largest cable MSOs (Comcast, Time Warner, Cox, and Cablevision) still have an interest in six of the Top 20 satellite-delivered networks as ranked by subscribership,[176] seven of the Top 20 satellite-delivered networks as ranked by prime time ratings,[177] almost half of all RSNs,[178] popular subscription premium networks, such as HBO and Cinemax,[179] and video-on-demand ("VOD") networks, such as iN DEMAND.[180] Moreover, as discussed in Section III.A.3.b below,[181] the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs has increased from 34 percent[182] to between 54 and 56.75 percent.[183] The record thus reflects that popular national programming networks, such as CNN, TNT, TBS, and The Discovery Channel, among many others, in addition to premium programming networks, RSNs, and VOD networks, are affiliated with the four largest vertically integrated cable MSOs and that such programming networks are demanded by MVPD subscribers. We thus find that cable-affiliated programming continues to represent some of the most popular and significant programming available today. As discussed in more detail below, the record

[175] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32; DIRECTV Comments at 7 ("There is – to be sure – more programming available now than there was in 2002. But, as the Commission explained then, the sheer amount of programming available has little to do with the must-see nature of any particular network."); *see also* AT&T Comments at 10-11; EchoStar Comments at 7; AT&T Reply Comments at 6-7; Qwest Reply Comments at 3-4; Verizon Reply Comments at 8-9. Indeed, the largest cable MSO – Comcast – concedes that "to the extent that MVPDs cannot survive without access to certain programming . . . what matters is whether that programming is 'must-have' in order to compete." *See* Comcast Comments at 24.

[176] These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News. *See* Kagan Research, LLC, *Network Census: June 30*; *Cable Program Investor* (July 28, 2006) at 11. We note that AT&T cites data which also includes Cartoon Network among the Top 20 satellite-delivered networks as ranked by subscribership. *See supra* note 70.

[177] These networks are TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel. *See* Nielsen Media Research, *Top 50 Cable Networks Primetime* (June 2006).

[178] *See 12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183.

[179] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32 (stating that although subscription premium networks such as HBO and Cinemax "are not among the top programming services in subscribership," they nonetheless "make an important contribution to an MVPD's revenue and profits"). Competitive MVPDs argue that first-run programming produced by HBO and other premium networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator. *See* AT&T Comments at 13-14 (quoting a cable executive as stating in 1990 that "certain channels such as . . . HBO are, for all practical purposes, 'must carries' for all cable systems" and contending that this statement "is only more true today" (citing *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd 4962, 5027, ¶ 118 (1990))); BSPA Comments at 6; Verizon Comments at 9 (stating that a new entrant needs to be able to offer customers premium programming such as HBO and Cinemax "in order to compete successfully against an established video provider").

[180] Competitive MVPDs argue that movie libraries owned by VOD networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator. *See* RCN Comments at 4 ("film libraries are similarly 'must have' for video on demand offerings (there is only one Gone with the Wind)").

[181] *See infra* Section III.A.3.b.

[182] *See 2002 Extension Order,* 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

[183] *See supra* note 131 (discussing percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs).

shows that vertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market.[184]

38. We disagree with cable MSOs to the extent they argue that there is no programming that can be considered essential for viable competition and that all programming networks have one or more competitively equal substitutes.[185] We recognize that there has been a net increase in the total amount of available programming networks and that there may be substitutes for some cable-affiliated programming networks.[186] Nevertheless, there exists a continuum of vertically integrated programming, "ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact)."[187] As we stated in the *2002 Extension Order*, "cable programming – be it news, drama, sports, music, or children's programming – is not akin to so many widgets."[188] We further explained that, when an MVPD "loses access to a popular national news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channel. Moreover, even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute."[189] Cable MSOs do not provide sufficient evidence of adequate substitutes for popular cable-affiliated programming.[190] We doubt, for example, that fans of one of the most popular cable programs, such as HBO's "The Sopranos," had their competitive MVPD been denied access to the cable-affiliated HBO network, would have regarded the original programming on other premium networks, such as Showtime, an adequate substitute for their favorite show. Despite the increase in available programming over the past five years, we find that cable operators still own popular programming for which there are no close substitutes.[191] The availability of new, non-integrated networks does not mitigate the adverse impact on competition of a competitive MVPD's inability to access popular vertically integrated programming. The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes.[192]

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[184] *See infra* ¶ 39 (discussing impact on competitive MVPD subscribership from withholding of cable-affiliated programming).

[185] *See* Cablevision Reply Comments at 2, 8-9 and Appendix B at 14; *see also* Time Warner Reply Comments at 13 n.23.

[186] *See* Cablevision Comments at 2-3, 18-27; Comcast Comments at 11-13; NCTA Comments at 5-7; Time Warner Reply Comments at 2.

[187] *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33.

[188] *Id*.

[189] *Id*.

[190] Cablevision lists various cable networks that offer certain categories of programming (such as news, sports, weather, and music), but offers no evidence that these networks are substitutable for one another. *See* Cablevision Comments at 20 n.69.

[191] *See supra* ¶¶ 18, 22, 37 (discussing cable's ownership of significant programming networks).

[192] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32 ("We agree with competitive MVPDs that access to vertically integrated programming continues to be necessary in order for these MVPDs to remain viable in the (continued….)

39. We find that access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable. An MVPD's ability to compete will be significantly harmed if denied access to popular vertically integrated programming for which no good substitute exists.[193] Because the exclusive contract prohibition applicable to satellite-delivered programming has been in effect since 1992, we do not have specific empirical evidence of the impact of withholding of satellite-delivered programming. However, for vertically integrated programming that is delivered terrestrially and therefore beyond the scope of Section 628(c)(2)(D), there is factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market. In the *Adelphia Order*, the Commission conducted an analysis which concluded that lack of access to RSN programming can decrease an MVPD's market share significantly because a large number of consumers will refuse to purchase the MVPD's service and will instead elect to purchase service from the cable operator that offers the RSN.[194] The analysis concluded that, without access to the cable-affiliated RSN in Philadelphia, the percentage of television households

(Continued from previous page)
marketplace."); *infra* ¶ 39 (discussing impact on competitive MVPD subscribership from withholding of cable-affiliated programming).

[193] *See 2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189; *id.* at 8258-59, ¶ 124 (stating that "RSNs are often considered 'must-have' programming. . . . Hence, an MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals"); *Hughes Order,* 19 FCC Rcd at 535, ¶ 133 (stating that "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game"); *12th Annual Report*, 21 FCC Rcd at 2596, ¶ 205 ("Access to must have programming, including major national cable networks and regional sports networks, on a timely basis and at competitive rates is a key competitive issue for all MVPDs."); *see also* AT&T Comments at 11 ("MVPDs still remain highly dependent on key programming owned by the established cable MSOs, including TBS, Discovery, TNT, CNN, TLC, and other popular basic cable networks, and also the regional sports network programming that the Commission found, in the *Adelphia Order*, could be used as a powerful weapon against potential competitors."); EchoStar Comments at 7 ("Withholding a single 'must have' programming network from competitive MVPD platforms can hamper, if not foreclose, the development and preservation of viable competition."). Numerous competitive MVPDs cite certain national programming networks as "must have" programming. *See* NRTC Comments at 20 (stating that an MVPD cannot "operate successfully" if that system lacks access to cable-affiliated networks such as CNN, HBO, TNT, and The Discovery Channel); SureWest Comments at 3 ("no MVPD could survive without access to the most popular, 'must-have,' programming channels such as CNN, TNT and HBO"); Qwest Comments at 5 ("Since subscribers ultimately are most interested in content, Qwest's ability to serve its customers is tied directly to its access to 'must-have' vertically integrated programming, including CNN, HBO, TNT, iN DEMAND pay-per-view content, Discovery, and regional sports networks."). Numerous competitive MVPDs also cite sports programming as "must have" programming. *See* AT&T Comments at 15 (stating that Congress and the Commission "have continued to recognize on multiple occasions the 'must have' nature of cable incumbents' regional sports networks"); BSPA Comments at 6; RCN Comments at 4 ("'Must have' programming is programming that has no close substitutes and cannot be duplicated no matter how much time and money are committed. Clearly, sports programming is 'must have' programming."); SureWest Comments at 3 ("sports programming is also core to an MVPD's survival in a competitive market"); USTelecom Comments at 14-15; Verizon Comments at 9 (stating that regional sports programming "is a key component of a competitive multichannel video service").

[194] *Adelphia Order*, 21 FCC Rcd at 8267-72, ¶¶ 140-51 and 8341-50, Appendix D; *see id* at 8271-72, ¶ 151("We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN."); *Hughes Order,* 19 FCC Rcd at 546-47, ¶ 159 (stating that withholding of RSN programming will cause consumers to lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform).

that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected.[195] In San Diego, the analysis concluded that lack of access to the cable-affiliated RSN results in a 33 percent reduction in the households subscribing to DBS service.[196] We also believe that a competitive MVPD's lack of access to popular non-RSN networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN. We are unaware of examples of nationally distributed programming being withheld from willing buyers as has occurred with some RSNs. Instead, we must turn to indirect evidence of the popularity of nationally distributed programming networks. A number of networks receive ratings higher than or equal to those of RSNs that are currently withheld from DBS providers.[197] While ratings are not a perfect predictor of consumer response to the withholding of a network, they do provide us with sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD.

40. We disagree with Cablevision's criticisms of the Commission's analysis in the *Adelphia Order*.[198] In that decision, the Commission conducted a statistical (regression) analysis which found, after holding other relevant factors constant, that non-cable MVPDs had significantly lower market shares in markets where they were denied access to an RSN.[199] As a threshold matter, the Commission's regression analysis is just one component of an economic analysis of a possible "uniform price increase strategy" that a cable operator (in particular, one of the applicants to acquire Adelphia cable systems) might follow with regard to RSNs. Under this scenario, a vertically integrated cable operator that has just increased the number of homes that it passes in a market where it also owns an RSN raises the price of the RSN to all MVPDs in the market, but not by an amount large enough to induce the rival MVPD in the market to stop carrying the RSN. The question posed by the analysis is whether this (sustainable) price increase is greater than the five percent level specified in the Department of Justice ("DOJ") Merger Guidelines. In the *Adelphia Order*, the Commission stated that "price increases of five percent or more would likely harm rival MVPDs' ability to compete and/or be passed on to consumers in some form, such

[195] *See Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149.

[196] *See id.* We also note that, according to data from Nielsen Media Research, in two cities where most competitive MVPDs are unable to access the cable-affiliated RSN (Philadelphia and San Diego), the collective market share of competitive MVPDs is well below their national average of 33 percent: Philadelphia (19.8 percent) and San Diego (13.7 percent). *See* DMA Household Universe Estimates July 2007: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink) (last visited Aug. 2, 2007); *see also* AT&T Comments at 17 (noting that DIRECTV's market share in San Diego is half of its national average); CA2C Comments at 9, 16; USTelecom Comments at 15; AT&T Reply Comments at 5 (stating that DBS subscription is lower in Philadelphia where Comcast has refused to provide RSN access). While Cablevision notes that DBS market penetration has in fact tripled in Philadelphia from 4 percent in 2000 to 12 percent at the end of 2006 despite the inability of DBS operators to access an RSN (*see* Cablevision Comments at 25; Cablevision Reply Comments at 12), cable market penetration is still significantly greater in Philadelphia (81.1 percent) than in metropolitan areas with a population similar to that of Philadelphia: Phoenix (70.1 percent), San Antonio (70.8 percent); and Dallas (53.5 percent). *See id*.

[197] According to data collected by Nielsen, Comcast SportsNet earned a 1 rating and 2 share in the all-day time period during the May 2006 ratings period in the Philadelphia DMA. Three programming networks earned superior ratings or shares while six networks earned equivalent ratings and shares. In the San Diego DMA during the same period, four programming networks earned ratings and shares equivalent to those earned by San Diego Channel 4, the RSN which carries San Diego Padres baseball games.

[198] *See* Cablevision Comments, Appendix B at 24-25.

[199] *Adelphia Order*, 21 FCC Rcd at 8267-72, ¶¶ 140-51 and 8341-50, Appendix D.

as increased rates or reductions in quality or customer service."[200] In other words, based on the analysis in the *Adelphia Order* showing that RSN prices would rise significantly in several markets post-merger, the Commission concluded that MVPD customers would be harmed. One of several parameters needed to assess the uniform price increase scenario is the amount by which subscribership to a competitive MVPD would fall if that MVPD were to choose not to carry the RSN. Cablevision's critique does not address the full uniform price increase analysis. Rather, it focuses on the regression equation. Cablevision offers several criticisms of the regression model, most of which amount to the assertion that some relevant explanatory variables were left out of the equation. These and other criticisms are addressed in detail in Appendix B. As explained therein, some of the variables claimed to be left out were, in fact, included. Moreover, even if some relevant variables were left out, that does not, in and of itself, indicate that the coefficients on the relevant dummy variables are inaccurate or biased. Moreover, we have estimated additional regression equations designed to include some of the variables that Cablevision claims should have been included. The new results, in fact, support the Commission's analysis in the *Adelphia Order*, and in some respects strengthen the conclusions reached in that decision. In sum, we do not find persuasive the Cablevision critique of our analysis in the *Adelphia Order*, including the regression analysis. We remain convinced that the regression analysis demonstrates that, with regard to RSNs and programming with similar characteristics (such as popularity and similar monthly per subscriber affiliate fee and network advertising revenue), withholding programming from rivals can be a profitable strategy for a vertically integrated cable programmer and that such withholding can have a significant impact on subscribership to the rival MVPDs. Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers.

41. We find that access to vertically integrated programming is essential for new entrants in the video marketplace to compete effectively. If the programming offered by a competitive MVPD lacks "must have" programming that is offered by the incumbent cable operator, subscribers will be less likely to switch to the competitive MVPD.[201] We give little weight to the claims by cable operators that recent entrants, such as telephone companies, have not experienced "any trouble" to date in acquiring access to satellite-delivered vertically integrated programming.[202] As an initial matter, we note that competitive MVPDs state that they pay significant amounts for access to satellite-delivered vertically integrated programming.[203] Moreover, because the exclusive contract prohibition is currently in effect and has been since 1992, vertically integrated programmers delivering programming to MVPDs via satellite were not able to deny competitors access to their programming.[204] As discussed in Section III.A.3.b below, however, there is substantial evidence that, when the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers may have an

[200] *See id*. at 8269, ¶ 143.

[201] *See 2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 34; *Adelphia Order*, 21 FCC Rcd at 8267-72, ¶¶ 140-51 and 8341-50, Appendix D; *supra* ¶ 39 (discussing impact on competitive MVPD subscribership from withholding of cable-affiliated programming).

[202] *See* Comcast Comments at 21; Comcast Reply Comments at 17; *but see* AT&T Reply Comments at 10 ("AT&T and Verizon already have experienced the cold shoulder in trying to obtain regional sports programming from incumbent cable operators.").

[203] *See* EchoStar Reply Comments at 19 (stating that cable operators repeatedly increase license fees for their affiliated networks); *see also* AT&T Comments at 11 (stating that RCN has told investors that it pays 37 percent of its revenues to Time Warner and Comcast for programming).

[204] *See* Verizon Comments at 3 (noting that it has not faced difficulty in obtaining satellite-delivered vertically integrated programming while the exclusive contract prohibition is in effect, but that it expects the situation to change if the prohibition were allowed to sunset).

incentive to withhold programming from these recent entrants.[205] We also reject the cable MSOs' suggestion that the resources of some competitors in the video distribution market (*i.e.,* telephone companies) should change our analysis of whether to extend the prohibition at this time.[206] The competitors to which the cable operators refer are new entrants to the video distribution market, and have no established customer base. If cable operators have exclusive access to content that is essential for viable competition and for which there are no close substitutes, and they have the incentive to withhold such content, they can significantly impede the ability of new entrants to compete effectively in the marketplace, regardless of their level of resources.[207] As we concluded in the *Adelphia Order*, excluding "must have" cable-affiliated content from DBS operators has reduced the percentage of households that subscribe to DBS service to as much as 40 percent below what would otherwise be expected.[208]

42. For the reasons discussed above, we conclude that there are no close substitutes for some satellite-delivered vertically integrated programming and that such programming is necessary for viable competition in the video distribution market.[209] Having made this determination, we further conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected.[210] Accordingly, assuming vertically integrated programmers continue to have the incentive to favor their affiliated cable operators, allowing vertically integrated programmers to enter into exclusive arrangements with their affiliated cable operators will fail to protect and preserve competition and diversity in the distribution of video programming.[211]

b. Incentive

43. We next assess whether vertically integrated programmers continue to have the incentive to favor their affiliated cable operators over competitive MVPDs.[212] This requires us to analyze (i) whether cable operators, through the number of subscribers they serve, the number of homes they pass, and their affiliations with programmers, continue to have market dominance of sufficient magnitude that, in the absence of the prohibition, they would be able to act in an anticompetitive manner; and (ii) whether there continues to be an economic rationale for vertically integrated programmers to engage in exclusive agreements with cable operators that will cause such anticompetitive harms.[213] As discussed in this

[205] *See infra* Section III.A.3.b.

[206] *See* Cablevision Comments at 2, 5; Comcast Comments at 20; Time Warner Reply Comments at 21.

[207] *See* Verizon Reply Comments at 11-12.

[208] *See Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149. As competitive MVPDs note, DBS providers have been able to attract and retain millions of subscribers because of their ability to offer "must have" programming that is affiliated with cable operators. *See* AT&T Comments at 10 n.25; CA2C Comments at 12. Moreover, we note that the Commission has attributed the increased growth of DBS subscribership in part to the ability of DBS operators to offer local broadcast signals, which Cablevision has referred to as "must have" content. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2792 ¶ 54 (2005); Comments of Cablevision Systems Corp., MB Docket No. 03-124 (June 16, 2003) at 3, 13-14, 18, 28 (referring to the Fox broadcast network as "must have").

[209] *See 2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 24.

[210] *See id.*

[211] *See id.*

[212] *See id.* at 12139-40, ¶ 35.

[213] *See id.*

section, we conclude that vertically integrated programmers continue to have the incentive to favor their affiliated cable operators over competitive MVPDs.

44. We briefly reiterate here how a vertically integrated cable programmer might attempt to harm the ability of rival MVPDs to compete through the use of exclusive contracts.[214] An exclusive arrangement between a cable-affiliated programmer and its affiliated cable operator will reduce the number of platforms distributing the cable-affiliated programming network and thus the total number of subscribers to the network. This results in a reduction in potential advertising or subscription revenues that would otherwise be available to the network. In the long term, however, the cable-affiliated programmer would gain from an increased number of subscribers as customers switch to the affiliated cable distribution service in order to receive the exclusive programming. Thus, an exclusive contract is a kind of "investment," in which an initial loss of profits from programming is incurred in order to achieve higher profits later from increased cable distribution. This type of arrangement is most profitable when the costs of the investment are low and its benefits are high. The costs are lowest when the initial loss in programming revenue is low, such as when the rival distributors that are excluded serve relatively fewer customers. The benefits of the investment tend to be highest when the vertically integrated cable programmer ultimately expects to serve a large number of subscribers, and will be able to charge them substantially more for cable distribution service than it could if it faced a strong rival distribution platform. We explained that the number of subscribers that a vertically integrated cable programmer serves is of particular importance in calculating the benefits of withholding programming from rival MVPDs. The larger the number of subscribers controlled by the vertically integrated cable programmer, the larger the benefits of withholding that accrue to that programmer. Thus, as the number of subscribers rises, so does the likelihood that withholding would be profitable.

45. In their comments, cable MSOs assert that they do not have an economic incentive to enter into exclusive programming agreements. First, they argue that they do not have a sufficient share of the MVPD market to make withholding of vertically integrated programming a profitable strategy.[215] Cablevision notes that the success of an exclusivity strategy depends on the ability of a vertically integrated programmer to recover a substantial portion of its lost revenues through increased distribution revenues.[216] As the number of subscribers to competing distributors rises, the likelihood of a successful withholding strategy decreases.[217] Cablevision contends that the nearly fifty percent increase in the number of customers served by rival MVPDs since 2002 has substantially increased the costs of an exclusivity strategy.[218] Second, cable MSOs argue that a typical programming network, no matter the ownership structure, will not foreclose opportunities to be as widely distributed as possible on multiple platforms.[219] Cablevision notes that a cable-affiliated programmer that enters into an exclusive arrangement with its affiliated distributor would risk being unable to recoup the significant license fees and advertising revenues that it loses by refusing access to competing platforms.[220] Cable MSOs claim that the over 30 million subscribers served by competitive MVPDs today represent a significant revenue

[214] *See id.* at 12140-41, ¶¶ 36-39.

[215] *See* Cablevision Comments at 16 and Appendix B at 11.

[216] *See id*.

[217] *See id*.

[218] *See id*. at 17.

[219] *See* Cablevision Comments at 4; Comcast Comments at 21-22; Comcast Reply Comments at 22; NCTA Reply Comments at 6.

[220] *See* Cablevision Comments at 16.

source that no programmer can afford to ignore.[221] Third, cable MSOs argue that competitive MVPDs in response to an exclusive arrangement are likely to engage in competitive counter-measures, such as cutting prices, acquiring other programming on an exclusive basis, or launching new services of their own.[222]

46. Competitive MVPDs argue that vertically integrated cable programmers continue to have powerful incentives to withhold vertically integrated programming to impede the viability of competitors.[223] CA2C cites an April 2005 GAO Report which concludes that DBS operators have relatively fewer subscribers in urban and suburban markets where they face a content disadvantage compared to the incumbent cable operator.[224] CA2C also notes that DBS market share in Philadelphia and San Diego drops almost in half due to the lack of access to RSNs as compared to other similar high-density markets where DBS operators have access to RSNs.[225]

47. Competitive MVPDs disagree with claims by cable MSOs that the decrease in the collective market share of cable operators between 2002 and 2005 means they can no longer profitably withhold affiliated programming. First, they note that the 67 percent share of MVPD subscribers held by the cable industry remains the dominant market position.[226] Second, they argue that the increase in horizontal consolidation of the cable industry increases the ability for cable MSOs to leverage power collectively through "cable only" exclusives – *i.e.*, the withholding of programming from rival MVPDs while selling it to other cable operators with which they do not compete.[227] For example, competitive MVPDs note that Comcast makes Comcast SportsNet Philadelphia available to all Philadelphia-area cable operators, but not to DIRECTV or EchoStar.[228] They also emphasize that while the market share of small-to-medium sized, non-vertically integrated cable operators has declined, the market share of the four largest vertically integrated cable operators has increased substantially since 2002.[229] Third, they point to an increase in regional clustering, which, they say, has increased the market share of individual cable operations within the footprints of regional programming and created expanded opportunities to implement exclusive arrangements.[230] In response to these concerns, Comcast notes that both the Commission and the Director of the Bureau of Economics of the Federal Trade Commission ("FTC")

[221] *See id*. at 20; NCTA Comments at 6.

[222] *See* Cablevision Comments at 8, 17; Cablevision Reply Comments at 11-12.

[223] *See* AT&T Comments at 3, 18; BSPA Comments at 3, 10; CA2C Comments at 7-8; Qwest Comments at 3 & n.6; USTelecom Comments at 4-5, 7; Verizon Comments at 5; *see also* Consumer Groups Reply Comments at 5.

[224] *See* CA2C Comments at 8 (citing Government Accountability Office ("GAO"), *Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO-05-257 (April 2005)).

[225] *See id*. at 9.

[226] *See* DIRECTV Comments at 7-9 (quoting Judge Richard A. Posner as stating that "monopoly power" is "ordinarily inferred from possession of a dominant share (some courts set the threshold at 50 percent or occasionally even lower, others at 67 or even 70 percent) in a market sufficiently broadly defined to include all close substitutes of the defendant's product" (citing Richard A. Posner, Antitrust Law 196 (2nd ed. 2001)); USTelecom Comments at 11.

[227] *See* DIRECTV Comments at 9-10; EchoStar Comments at 6.

[228] *See* AT&T Comments at 16; DIRECTV Comments at 10.

[229] *See* EchoStar Reply Comments at 4-5.

[230] *See* BSPA Comments at 17; CA2C Comments at 17-18; DIRECTV Comments at 10-11; RCN Comments at 7; Consumer Groups Reply Comments at 4-5; RCN Reply Comments at 10-11; SureWest Reply Comments at 3.

have acknowledged that clustering may enable cable operators to achieve greater economies of scale and scope, thereby reducing costs.[231]

48. Some competitive MVPDs argue that the recent entry of telephone companies into the video market provides cable operators with an increased incentive to withhold programming to stifle competition.[232] They contend that video service offered by telephone companies provides more price discipline to cable than does DBS and that telephone companies also offer broadband services in competition with cable operators.[233] They also note that wireline entry is still well below two percent of the nation's total MVPD subscribership.[234] AT&T and Verizon characterize as insignificant the short-term costs to cable incumbents of foregoing revenues from providing programming to the minimal subscriber bases of new entrants.[235] In the long term, they claim, the benefits to cable operators of limiting new entry will far outweigh the costs of lost revenues from excluding new entrants with minimal subscribership from their programming.[236] AT&T notes that the Commission in the *2002 Extension Order* found that cable operators had an economic incentive to withhold programming from DBS operators when the market share of DBS operators was 18 percent.[237] AT&T claims that the incentive for cable-affiliated programmers to withhold programming from new telephone company entrants with only a two percent market penetration is far greater.[238]

49. While cable MSOs argue that they have no incentive to withhold programming, competitive MVPDs provide the following examples which they claim demonstrate that cable MSOs will withhold programming if advantageous and permitted.[239] Competitive MVPDs argue that many of the examples listed below, involving terrestrially delivered programming (sports as well as non-sports) – for which the exclusive contract prohibition does not apply – demonstrate the incentive and ability of vertically integrated cable operators to deny access to programming where permitted by the statute.

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[231] *See* Comcast Reply Comments at 14 n.41 (citing *Eighth Annual Report*, 17 FCC Rcd at 1304-05, ¶ 140; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6076, ¶ 166 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, 1051, ¶¶ 161-62 (2000); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24371-72, ¶¶ 144-48 (1998); *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?: Before the Senate Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Michael Salinger, Director, Bureau of Economics, FTC), available at: http://judiciary.senate.gov/testimony.cfm?id=2454&wit_id=5929).

[232] *See* AT&T Comments at 22-24; RCN Comments at 12; SureWest Reply Comments at 2; AT&T Reply Comments at 8-9.

[233] *See* AT&T Comments at 3, 22-23; USTelecom Comments at 6-7.

[234] *See* CA2C Comments at 5 (citing Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association, MB Docket No. 92-264 (Mar. 16, 2007) at 4); Qwest Comments at 2-3; USTelecom Comments at 10-11.

[235] *See* AT&T Comments at 5; Verizon Comments at 12; RCN Reply Comments at 10.

[236] *See* AT&T Comments at 18-19.

[237] *See* AT&T Comments at 21 (citing *2002 Extension Order*, 17 FCC Rcd at 12144-45, ¶ 46).

[238] *See id*.

[239] *See* AT&T Comments at 4; BSPA Comments at 17; CA2C Comments at 17; RCN Comments at 10-11; RICA Comments at 5; SureWest Comments at 5-6; USTelecom Comments at 15-16; Verizon Comments at 12-14; CA2C Reply Comments at 7-8; EchoStar Reply Comments at 16-17; Qwest Reply Comments at 4; Verizon Reply Comments at 5-6.

Sports Programming

- *Comcast SportsNet Philadelphia*. Some competitive MVPDs state that Comcast refuses to make the terrestrially delivered Comcast SportsNet Philadelphia channel available to EchoStar and DIRECTV.[240] Competitive MVPDs cite the Commission's conclusion in the *Adelphia Order* that the percentage of households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected.[241] In response, Comcast notes that Comcast SportsNet Philadelphia is available to RCN.[242]

- *Channel 4 San Diego*. Some competitive MVPDs claim that Cox makes available its Channel 4 San Diego network, which has exclusive rights to San Diego Padres baseball games, only to cable operators that do not directly compete with Cox and not to DIRECTV, EchoStar, and AT&T.[243] While competitive MVPDs state that DIRECTV's market penetration in San Diego is half of its national average,[244] Cablevision notes that DIRECTV in the *Adelphia* proceeding reported that it did not find a statistically significant effect on its market penetration in San Diego resulting from its inability to access this RSN.[245]

- *Overflow sports programming in New York, NY*. RCN notes that it was deprived of access to overflow sports programming from Cablevision after Cablevision revised its distribution system from satellite to terrestrial delivery.[246] While RCN filed a program access complaint, the Cable Services Bureau denied the complaint because the programming was terrestrially delivered and thus beyond the scope of Section 628(c)(2)(D).[247] The Bureau also found that Cablevision did not evade the Commission's rules by changing its distribution system from satellite to terrestrial delivery.[248]

- *RSNs Affiliated with Cablevision in New York and New England*. Verizon notes that it was forced to file a program access complaint against Cablevision and its vertically integrated programming subsidiary, Rainbow Media Holdings, LLC, in order to obtain access to RSNs in the New York City metropolitan area and New England.[249] While the dispute was eventually settled, competitive MVPDs state that the case illustrates the efforts of cable operators and their vertically integrated programmers to forestall competition from new entrants such as Verizon.[250]

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[240] *See* CA2C Comments at 16; EchoStar Comments at 9; RCN Comments at 10; USTelecom Comments at 15.

[241] *See* AT&T Comments at 16 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149).

[242] *See* Comcast Reply Comments at 20.

[243] *See* AT&T Comments at 17; CA2C Comments at 16; USTelecom Comments at 15; Verizon Reply Comments at 5.

[244] *See* AT&T Comments at 17.

[245] *See* Cablevision Comments at 26 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 148).

[246] *See* RCN Comments at 10; *see also* CA2C Comments at 17.

[247] *See RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 14 FCC Rcd 17093 (CSB, 1999), *affirmed RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 16 FCC Rcd 12048 (2001).

[248] *See id*.

[249] *See* Verizon Comments at 13.

[250] *See* AT&T Comments at 18; USTelecom Comments at 15; Verizon Comments at 13.

- *High Definition ("HD") Feeds of RSNs Affiliated with Cablevision*. While Rainbow has made available standard definition feeds of its RSNs, Verizon states that Rainbow is delivering HD feeds of this programming terrestrially to avoid the program access rules.[251] Verizon also claims that Cablevision's advertising campaign in New York City emphasizes its ability to offer more HD sports than its competitors.[252] In response, Comcast states that HD networks are distinct from their analog counterparts and that the Commission has recognized this distinction.[253]

Non-Sports Programming

- *New England Cable News ("NECN") in Boston, MA.* One commenter claims that RCN was provided with access to NECN, a terrestrially delivered network that is 50 percent owned by Comcast, only after the Senate Judiciary Committee indicated that they were considering legislative action to apply an exclusive contract prohibition to terrestrially delivered programming.[254]

- *PBS Kids Sprout*. AT&T and RCN claim that after PBS Kids Sprout became vertically integrated with Comcast, RCN lost access to the network, resulting in an 83 percent drop in the usage of its children's VOD service.[255] Comcast and PBS Kids Sprout dispute these allegations, stating that this programming is available to all MVPDs and, in fact, RCN, Verizon, and AT&T currently distribute PBS Kids Sprout.[256]

- *iN DEMAND*. CA2C notes that iN DEMAND is jointly owned by Time Warner, Comcast, and Cox.[257] CA2C argues that iN DEMAND has taken the position that its programming is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D) because iN DEMAND programming is delivered to MVPDs terrestrially.[258] CA2C claims that iN DEMAND initially refused to provide its service to BSPs that competed with incumbent cable operators and that it reversed this position only after meetings were held with the Antitrust Subcommittee of the Senate Judiciary Committee.[259] Nonetheless, CA2C contends that iN DEMAND has refused to provide its service to Hiawatha Broadband because of the technology Hiawatha uses for its distribution system.[260] Qwest provides a declaration regarding its alleged inability to acquire iN DEMAND's sports packages in a timely manner.[261]

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[251] *See* Verizon Comments at 13-14; Verizon Reply Comments at 5.

[252] *See* Verizon Comments at 13.

[253] *See* Comcast Reply Comments at 29 n.90 (citing *12th Annual Report*, 21 FCC Rcd at 2626-42, Table C-2).

[254] *See* CA2C Comments at 16-17.

[255] AT&T Comments at 15; RCN Reply Comments at 7.

[256] *See* Comcast Reply Comments at 21; Letter from Sandy Wax, President, and Adrienne Byrd, Senior Director, Legal Affairs, PBS KIDS Sprout, to Ms. Marlene H. Dortch, FCC, MB Docket No. 07-29 (May 3, 2007).

[257] *See* CA2C Reply Comments at 7.

[258] *See id*.

[259] *See id.* at 7-8.

[260] *See id*. at 8.

[261] *See* Qwest Reply Comments at 4; *see also* CA2C Reply Comments at 8.

- *CN8 – The Comcast Network*. Qwest claims that CN8 – The Comcast Network is a local news and information channel that serves 12 states and 20 television markets but is only available to Comcast and Cablevision subscribers because it is terrestrially delivered and therefore beyond the scope of Section 628(c)(2)(D).[262]

- *NRTC*. NRTC, which acts as a "buying group" on behalf of its members, claims that it has been denied access to two vertically integrated programming networks, the identities of which it claims it cannot disclose due to non-disclosure agreements.[263]

AT&T argues that if cable-affiliated programmers had an economic incentive to distribute their programming as widely as possible, as cable MSOs claim, then there would be no examples of any such exclusionary behavior.[264] AT&T also notes that cable operators actively advertise their exclusive access to certain content in order to attract and retain subscribers.[265] Comcast contends these examples do not offer sufficient proof of market failure that requires government intervention.[266]

50. *Discussion*. We conclude that vertically integrated cable programmers retain the incentive to withhold programming from their competitors. We recognize the pro-competitive developments in the MVPD market since the *2002 Extension Order*, such as the reduction in the cable industry's share of MVPD subscribers from 78 percent to an estimated 67 percent and the increase in the DBS industry's market share from 18 percent to approximately 30 percent.[267] Despite these positive trends, however, almost seven out of ten subscribers still choose cable over competitive MVPDs, the percentage of all MVPD subscribers nationwide served by one of the four largest vertically integrated cable operators has increased substantially since 2002, and cable operators have continued to raise prices in excess of inflation.[268] While cable MSOs claim that the emergence of telephone companies as new video competitors demonstrates that competition is flourishing, the fact is that, based on estimates provided by the cable industry, competitive MVPDs, excluding DBS operators, serve approximately three percent of all MVPD subscribers nationwide, which accounts for less than three million total MVPD subscribers.[269] Moreover, as we explained in our decision on franchising reform, competition from cable overbuilders is minimal, with only a few hundred examples of competitive franchises throughout the nation.[270] This is one reason why we have explored ways to lower barriers to entry in the video

[262] *See* Qwest Comments at 4.

[263] *See* NRTC Comments at 5.

[264] *See* AT&T Comments at 19.

[265] *See id*. at 19-20; AT&T Reply Comments at 4.

[266] *See* Comcast Reply Comments at 19.

[267] *See supra* note 100 (indicating that DBS operators have an approximate 30 percent share of the MVPD market).

[268] *See 2006 Cable Price Report*, 21 FCC Rcd at 15087-88, ¶ 2.

[269] *See supra* note 96 (indicating that cable operators have an approximate 67 percent share of the MVPD market); *supra* note 100 (indicating that DBS operators have an approximate 30 percent share of the MVPD market); USTelecom Comments at 10 (citing *12th Annual Report*, 21 FCC Rcd at 2506-07, ¶ 8 (stating that, as of June 2005, only 2.9 percent of MVPD subscribers receive service from an alternative provider to cable or DBS)); *see also* CA2C Comments at 5 ("Despite the growth of DBS, cable operators have still maintained their position in the market."); USTelecom Comments at 9 ("Now, nearly five years since the [*2002 Extension Order*], the MSOs' grip on the multichannel video market has remained firm . . . .").

[270] *See Local Franchising Report and Order*, 22 FCC Rcd at 5110, ¶ 19.

marketplace.[271] Although we are encouraged by developments since 2002, we do not believe these developments have been significant enough for us to reverse the Commission's previous conclusion that cable operators have market dominance of sufficient magnitude that, in the absence of the prohibition, they would be able to act in an anticompetitive manner.[272]

51. We also conclude that cable-affiliated programmers continue to have an economic incentive to favor their affiliated cable operators over competitive MVPDs by entering into exclusive agreements. We agree that in many instances a cable-affiliated programmer may choose to provide its programming to as many platforms as possible in order to maximize advertising and subscription revenues. In other cases, however, cable-affiliated programmers will have an incentive to withhold programming from competitive MVPDs in order to favor their affiliated cable operator. Our conclusion that vertically integrated cable programmers retain the incentive to withhold programming from their competitors is reinforced by specific factual evidence that vertically integrated programmers have withheld and continue to withhold programming, including both sports and non-sports programming, from competitive MVPDs.[273] While many of these examples pertain to terrestrially delivered programming that is beyond the scope of Section 628(c)(2)(D), we find that these examples are nonetheless significant because they demonstrate that, absent a prohibition, cable-affiliated programmers will engage in withholding of programming from competitive MVPDs. Moreover, because it is outside of the scope of the program access provisions, the withholding of terrestrially delivered programming presents the most direct, factually based evidence of cable MSO behavior if the prohibition is permitted to lapse. If vertically integrated programmers had no economic incentive other than to distribute their programming to as many platforms as possible, then we would not expect to see such examples of withholding.[274]

52. While the cable industry's share of MVPD subscribers nationwide has decreased from 78 percent to approximately 67 percent since the *2002 Extension Order*,[275] we conclude that this market share is still sufficient to enable cable-affiliated programmers to make withholding vertically integrated programming a profitable strategy. Moreover, while the cable industry's share of MVPD subscribers nationwide has declined since the *2002 Extension Order*, it has remained above or near the 78 percent

[271] *See id.* at 5111, ¶ 20*; MDU Access NPRM*, 22 FCC Rcd at 5938, ¶ 6.

[272] *See 2002 Extension Order*, 17 FCC Rcd at 12143-45, ¶¶ 45-46.

[273] *See supra* ¶ 49 (discussing evidence of withholding of cable-affiliated programming from competitive MVPDs); *DIRECTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802, 22807-08, ¶¶ 11-14 (2000) (resolving program access dispute), *aff'g*, *EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089 (1999), *DIRECTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822 (1998), *aff'd sub nom. EchoStar Communications Corporation v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 14 FCC Rcd at 17103-07, ¶¶ 20-27 (resolving program access dispute), *affirmed RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 16 FCC Rcd 12048 (2001); *see also EchoStar Comments* at 9 ("Indeed, cable conglomerates have already demonstrated their willingness to abuse exclusive programming rights to gain market share and harm consumers. The well-worn example of Comcast's conduct in Philadelphia with its SportsNet asset is again instructive.").

[274] While cable MSOs claim that competitive MVPDs were unable to demonstrate any harm to their ability to compete in one of these cases (Channel 4 San Diego) (*see* Cablevision Comments at 26 (citing *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 148)), this is irrelevant to the issue of whether cable-affiliated programmers have the *incentive* to engage in withholding of programming from competitive MVPDs. These examples demonstrate that, absent a prohibition, cable-affiliated programmers have an incentive to engage in withholding.

[275] *See supra* note 96 (indicating that cable operators have an approximate 67 percent share of the MVPD market).

level in many Designated Market Areas ("DMAs"),[276] indicating that cable operators retain the same share of MVPD subscribers in many markets as in 2002.[277] In the *2002 Extension Order*, based on the cable industry's 78 percent national market share at the time, the Commission found that a "cable-only" distribution strategy would reduce potential subscribership or viewership for a cable-affiliated programming network by one-fifth.[278] The Commission concluded that the revenues foregone by a cable-affiliated programmer by refusing to sell to competitive MVPDs would thus be "relatively low."[279] While the reduction in potential nationwide subscribership or viewership has now increased to one-third based on the cable industry's current national market share of approximately 67 percent, we find that this reduction in potential subscribership or viewership has not reached a point where withholding would be unprofitable.[280] Moreover, because the share of MVPD subscribers held by cable operators is above or near 78 percent in many DMAs, there is no reduction in potential subscribership or viewership in many regional areas from that which we observed in the *2002 Extension Order*.[281] As the Commission did in the *2002 Extension Order*, we find that the costs (*i.e.*, foregone revenues) incurred by a cable-affiliated programmer by refusing to sell to competitive MVPDs would be offset by (i) revenues from increased subscriptions to the services of its affiliated cable operator resulting from subscribers that switch to cable to obtain access to the cable-exclusive programming;[282] (ii) revenues from increased rates charged by the

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[276] A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. *See Time Warner Entertainment*, Memorandum Opinion and Order, DA 07-3400, 2007 WL 2159623, ¶ 2 (MB, 2007).

[277] *See 2002 Extension Order,* 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247, ¶ 5). Based on data from Nielsen Media Research, as of July 2007, the share of MVPD subscribers held by cable operators exceeds 78 percent in 36 out of 210 DMAs and is between 75 and 78 percent in an additional 16 DMAs. *See* DMA Household Universe Estimates July 2007: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink) (last visited Aug. 2, 2007). These include sixteen of the Top 50 most-populated DMAs: New York (No.1; 83.7 percent cable market share); Philadelphia (No. 4; 81.1 percent cable market share); Boston (No. 7; 87.1 percent cable market share); Tampa-St. Pete (No. 12; 81.1 percent cable market share); Seattle (No. 14; 79.3 percent cable market share); Cleveland-Akron (No. 17; 78.6 percent cable market share); Orlando (No. 19; 75.7 percent cable market share); Pittsburgh (No. 22; 79.6 percent cable market share); Baltimore (No. 24; 80.3 percent cable market share); San Diego (No. 27; 87.1 percent cable market share); Hartford-New Haven, CT (No. 28; 86.4 percent cable market share); Columbus (No. 32; 78 percent cable market share); Milwaukee (No. 34; 79.1 percent cable market share); Harrisburg-Lancaster, PA (No. 41; 79.5 percent cable market share); Norfolk-Portsmouth-Newport News, VA (No. 42; 77.6 percent cable market share); Las Vegas (No. 43; 75.9 percent cable market share). *See id*.

[278] *See 2002 Extension Order*, 17 FCC Rcd at 12147-48, ¶ 53.

[279] *See id*.

[280] We also noted in the *2002 Extension Order* that if vertically integrated programmers entered into exclusive arrangements with only the top ten MVPDs (excluding DBS providers), those programmers would still retain access to over 66 percent of all MVPD subscribers, which reflected a three percent increase from 1994. *See 2002 Extension Order*, 17 FCC Rcd at 12148, ¶ 53 n.172. These figures are similar in the current video distribution market. Today, if vertically integrated programmers entered into exclusive arrangements with only the top ten MVPDs (excluding DBS providers), those programmers would still retain access to over 60 percent of all MVPD subscribers. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[281] *See 2002 Extension Order*, 17 FCC Rcd at 12147-48, ¶ 53.

[282] *See id.*

affiliated cable operator in response to increased demand for its services resulting from its ability to offer exclusive programming;[283] and (iii) revenues resulting from the ability of the cable-affiliated programmer to raise the price it charges for programming to other cable operators in return for exclusivity.[284] Thus, particularly where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy. In the long term, a withholding strategy may result in a reduction in competition in the video distribution market, thereby allowing the affiliated cable operator to raise rates. As discussed in Appendix C, we have also made critical value calculations which conclude that withholding of some nationally distributed programming networks could be profitable if as little as 1.9 percent of non-cable subscribers were to switch to cable as a result of the withholding.[285] We believe that these subscriber numbers are sufficiently low as to make it likely that cable MSOs will pursue national "cable only" withholding strategies with some networks in the absence of the exclusivity prohibition. We thus conclude that the one-third share of the MVPD market held by competitive MVPDs remains limited enough to allow cable-affiliated programmers to successfully and profitably implement a withholding strategy.

53. We also find that three additional developments since 2002 provide cable-affiliated programmers with an even greater economic incentive to withhold programming from competitive MVPDs: (i) the increase in horizontal consolidation in the cable industry; (ii) the increase in clustering of cable systems; and (iii) the recent emergence of new entrants in the video market place, such as telephone companies.

54. *Horizontal Consolidation*. The cable industry has continued to consolidate since 2002. Since this time, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased from 34 percent[286] to between 54 and 56.75 percent.[287] Moreover, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased from 48 percent[288] to between 53 and 60 percent after taking into account the recent acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia.[289] Thus, while the evidence demonstrates that the market share of small-to-medium sized, non-vertically integrated cable operators has declined, the market share of large cable operators, and in particular those that own cable programming, has increased substantially since 2002. In the *2002 Extension Order*, the Commission observed that because four of the five largest vertically integrated cable operators served 34 percent of all MVPD subscribers, they could reap a substantial portion of the gains from withholding programming from their rivals.[290] Now that the market share of the four largest

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[283] *See id.*

[284] *See id.*

[285] *See* Appendix C, ¶ 21.

[286] *See 2002 Extension Order,* 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341, Table C-3).

[287] *See supra* note 131 (discussing percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs).

[288] *See 2002 Extension Order,* 17 FCC Rcd at 12133, ¶ 21.

[289] *See supra* note 129 (discussing percentage of MVPD subscribers receiving their video programming from one of the four largest cable operators).

[290] *See 2002 Extension Order,* 17 FCC Rcd at 12147-48, ¶ 53.

vertically integrated cable MSOs has increased to between 54 and 56.75 percent, the largest vertically integrated cable operators stand to gain even more from a withholding strategy.[291] Thus, the increase in horizontal consolidation in the cable industry since 2002 increases the incentive to pursue anticompetitive withholding strategies.

55. *Clustering*. The cable industry has continued to form regional clusters since the *2002 Extension Order*, when approximately 80 percent of cable subscribers were served by systems that were part of regional clusters.[292] Today, taking into account the sale of Adelphia's systems to Comcast and Time Warner, some estimate that the percentage of cable subscribers served by systems that are part of regional clusters has increased to between 85 and 90 percent.[293] The Commission concluded in the *2002 Extension Order* that horizontal consolidation and clustering combined with affiliation with regional programming contributed to the cable industry's overall market dominance.[294] Given the increase in horizontal consolidation and regional clustering since 2002, this statement is no less true today. With a regional programming denial strategy, a cable-affiliated programmer foregoes only those revenues associated with the subscribers of competitive MVPDs within the cluster, not the revenues associated with subscribers of competitive MVPDs nationwide.[295] As the Commission concluded previously, in many cities where cable MSOs have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates.[296] Moreover, due to the national distribution of DBS services and the insufficient mass of DBS subscribers on a regional basis, DBS operators do not have an economic base for substantial regional programming investments on a market-by-market basis.[297] As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high.[298] While Comcast claims that increased clustering may result in synergies and cost-saving efficiencies, this

[291] *See* EchoStar Comments at 2-6; USTelecom Comments at 9-10; *see also supra* note 131 (discussing percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs).

[292] *See 2002 Extension Order,* 17 FCC Rcd at 12133-34, ¶ 22 (citing *8th Annual Report*, 17 FCC Rcd at 1252, ¶ 14).

[293] *See Consumer Groups Reply* at 4-5.

[294] *See 2002 Extension Order,* 17 FCC Rcd at 12125, ¶ 4.

[295] *See id*. at 12148-49, ¶ 54.

[296] *See id*. For example, according to data from Nielsen Media Research, the collective market penetration of competitive MVPDs in many DMAs where cable MSOs have clusters is far less than their collective nationwide market penetration rate (approximately 33 percent): San Diego (13.7 percent), New York (18.2 percent), Philadelphia (19.8 percent), and San Francisco (26.9 percent). *See* DMA Household Universe Estimates July 2007: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink) (last visited Aug. 2, 2007). As the Commission acknowledged in the *2002 Extension Order*, this market penetration data may not correspond exactly to cable MSO cluster boundaries, and there are likely other factors, such as line-of-sight, in addition to cable competition that affect city market penetration. *See 2002 Extension Order*, 17 FCC Rcd at 12148-49, ¶ 54 n.177. Nevertheless, we believe that this market penetration data provide support for the position that market penetration of competitive MVPDs is lower in certain cable cluster areas than nationwide. *See id.*

[297] *See 2002 Extension Order,* 17 FCC Rcd at 12151, ¶ 59.

[298] *See id*.

has no relevance to the issue of the impact of increased clustering on the potential for regional programming denial strategies.[299]

56. As discussed further in Appendix C, although cable's national share of total MVPD subscribers has declined, the situation is somewhat different at the individual market level. In some markets, the cable share of MVPD subscribers remains high, well above the average level and, indeed, above the 2002 national level of 78 percent that we found problematic in the *2002 Extension Order*.[300] However, clustering -- an increase over time in the number of cable subscribers and homes passed by a single MSO in particular markets (accomplished via internal growth as well as by acquisitions) -- also enhances the potential profitability of withholding regional programming from rivals. To understand the impact of this development in the cable television sector, we consider the calculations of a vertically integrated satellite cable programmer ("VISCP") that is contemplating a "cable-only" strategy of withholding its RSN from DBS and other non-cable MVPDs in the market. If the RSN is withheld, the VISCP will lose, initially, all those subscribers who were receiving the RSN via non-cable MVPDs. Some of those subscribers will switch to cable in order to retain access to the RSN. Of course, only those subscribers whose homes are passed by cable have the option to switch. Thus, the share of television households in the market that are passed by cable, either the VISCP's cable affiliate or other operators, is of importance. With respect to those subscribers that switch to a cable operator other than the VISCP's cable affiliate, the VISCP will simply regain the revenues (affiliation fee and network advertising revenue per subscriber) lost due to withholding from the non-cable MVPDs. However, with respect to those who switch to the VISCP's cable affiliate, the VISCP will gain substantially more. Those who switch to the VISCP's cable affiliate do not simply purchase the RSN. Rather, they must purchase a full video package from the VISCP's cable affiliate. Thus, the VISCP and its cable affiliate gain the full additional profit from a new subscriber, in addition to regaining the network advertising revenue per subscriber lost temporarily due to the withholding.[301] The key point is that the larger the share of television households in the market that is served by the VISCP's cable affiliate (*i.e.*, the larger the ratio of homes passed by the VISCP's cable affiliate to total television households), the larger is the total number of switching subscribers that switch to the VISCP's cable affiliate (as opposed to switching to another cable operator), and the greater is the potential compensating gain to the VISCP and its cable affiliate.

57. Thus, separate from what has been occurring in the national MVPD market, certain developments in the cable market may have made withholding of regional networks potentially more profitable than previously. Two types of empirical analyses can be performed to assess these developments. First, it is possible to track changes in clustering from 2002 to 2007 for certain key MSOs. Second, it is possible, under certain simplifying assumptions, to assess the circumstances under which withholding of regional programming would be profitable in the absence of the exclusivity restriction.[302]

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[299] *See* Comcast Reply Comments at 13-14.

[300] Nielsen Media Research data for May 2007 indicate that there are 40 DMAs with a wired cable percentage of total subscription television households greater than 78 percent. The 40 comprise: 13 in the top 50 markets, another 8 in the top 100 markets, and 19 in markets above 100. Of the 14 markets with shares between 75 and 78 percent, there are 4 in the top 50, another 5 in the top 100, and 5 above 100. *See* DMA Household Universe Estimates May 2007: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink; then follow "ADS Archives" hyperlink) (last visited Aug. 2, 2007).

[301] There is no gain in affiliation fee, since the VISCP is paying that to its affiliate for its own subscribers.

[302] *Hughes Order,* 19 FCC Rcd at 633-48, Appendix D (explaining methodology).

58. *Analysis of Increase in Clustering from 2002 to 2007*. Substantial increases in clustering, *i.e.*, the number of DMAs in which homes passed by a single cable operator is a large share of total television households, would mean that withholding is likely more profitable than it was before. This calculus (assuming the market structure and financial parameters stated in Appendix C) applies not only to markets where there is a VISCP, but to any market, since, if the exclusivity limit were relaxed, any cable operator would be permitted to start a new regional network or acquire an existing one and then withhold it from rivals. As discussed in Appendix C, we conclude that there has been a substantial increase in clustering among the two largest vertically integrated cable operators since adoption of the *2002 Extension Order*.

59. *Analysis of Profitability of Withholding of Regional Programming*. The second type of analysis we conducted was to estimate directly the profitability of withholding a regional network based on the structure of the market[303]and certain financial parameters.[304] These calculations were made for all DMAs for which data were available, using Comcast and Time Warner subscriber and profitability estimates from public sources, and using 2006 data on the average affiliate fee and network advertising revenue per subscriber for an RSN. The analysis yields a "critical value," representing the percentage of current non-cable MVPD subscribers in a DMA that would need to switch to cable in response to withholding of an RSN in order to make this strategy profitable. In order to determine what critical value is realistic, we examined the case of Philadelphia, where Comcast is currently withholding its RSN from DBS operators. As explained in Appendix C, withholding in the Philadelphia DMA of an RSN with average profile would be profitable if 5.45 to 8.4 percent of non-cable MVPD subscribers switched to cable. Conducting the analysis using the actual 2006 profile of the Comcast SportsNet Philadelphia RSN yields critical values in the 6.81 to 10.49 percent range. As explained in detail in Appendix C, the data demonstrates that (i) withholding would be profitable for Comcast in as many as 39 DMAs;[305] and (ii) withholding would be profitable for Time Warner in as many as 20 DMAs.[306] The calculations further demonstrate that, using Comcast profitability figures and the Comcast SportsNet Philadelphia RSN profile, withholding becomes profitable when a single MSO reaches homes passing roughly 60 percent of television households in a DMA. Using Time Warner profitability and the Comcast SportsNet Philadelphia RSN profile, withholding would become profitable when a single MSO reaches homes passing at least 80 percent of television households in a DMA. Our assessment of the calculated critical values convinces us that, in a significant range of cases, withholding of an RSN would be profitable for the VISCP and that, absent the exclusivity prohibition, valuable programming would be withheld from rival MVPDs.

60. *Recent Entrants*. Another significant development since 2002 is the emergence of new entrants into the video marketplace, including telephone companies.[307] We agree that vertically integrated

[303] Factors considered include: the share of television households in the market passed by a VISCP's cable affiliate; the share of television households in the market passed by other cable operators; and the share of television households in the market that subscribe to a non-cable MVPD.

[304] Factors considered include: per subscriber profits (net of amortized subscriber acquisition cost) earned per month by the VISCP's cable affiliate on a new cable subscriber; affiliate fee revenue per subscriber earned by the VISCP from its regional network; and network advertising revenue per subscriber earned by the VISCP from its regional network.

[305] The data indicates that Comcast provides service to at least part of 97 DMAs.

[306] The data indicates that Time Warner provides service to at least part of 89 DMAs.

[307] At the time of the *2002 Extension Order*, competition in the video marketplace from telephone companies had not yet emerged. Indeed, we stated at the time that "the strong overbuild competition from local exchange carriers (continued….)

cable programmers may have an even greater economic incentive to withhold programming from these recent entrants in the video marketplace. Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible.[308] To be sure, a vertically integrated programmer that withholds programming from one competitive MVPD in a market would generally need to withhold the programming from all other competitive MVPDs in the market, thereby increasing the foregone revenues resulting from a withholding strategy.[309] Even so, the short term costs to the vertically integrated programmer of withholding its programming from all competitive MVPDs (*i.e.*, the reduction in potential advertising or subscription revenues) are likely to be outweighed by the long term benefits to its affiliated cable operator of (i) hindering and potentially eliminating competition from new entrants, including those with substantial resources such as incumbent telephone companies; and (ii) increased revenues resulting from attracting subscribers away from competitive MVPDs. Cable MSOs suggest that if the justification for extending the exclusive contract prohibition is the emergence of new competitors, then the exclusive contract prohibition could be extended in perpetuity whenever new potential competitors emerge.[310] We disagree. As discussed above, vertically integrated programmers are likely to have the incentive to withhold programming only when their affiliated cable operators have a sufficient share of the distribution market to minimize the impact of foregone subscription and advertising revenues from denying access to other distributors. At this time, we conclude that vertically integrated programmers are likely to retain this incentive given the 67 percent share of the video distribution market held by cable operators. If competition in the MVPD market continues to develop and cable market share continues to decline, however, the incentive of vertically integrated programmers to engage in withholding will presumably diminish to the extent that we may be able to relax the exclusive contract prohibition. Moreover, the availability of exclusivity petitions pursuant to Section 628(c)(2) and (4) allows for appropriate treatment of unique competitive situations.

61. Cable MSOs argue that new entrants in the video marketplace such as AT&T and Verizon will never exit the video distribution market regardless of whether they are denied access to cable-affiliated programming because of the substantial sunk investments they have already made in video distribution networks.[311] In considering whether to allow the exclusive contract prohibition to sunset, our primary focus is on the impact that sunset would have on competition and diversity in the distribution of video programming generally, not on individual competitors and not on programming

(Continued from previous page)
and others that Congress anticipated as a result of the 1996 amendments to the Communications Act has, as yet, failed to develop." *See 2002 Extension Order,* 17 FCC Rcd at 12144-45, ¶ 46.

[308] *See* AT&T Comments at 5; Verizon Comments at 12; AT&T Reply Comments at 8-9; RCN Reply Comments at 10.

[309] We note that, if the exclusive contract prohibition in Section 628(c)(2)(D) were to sunset, other program access provisions in Section 628 would remain, including the prohibition on discrimination. *See* 47 U.S.C. § 628(c)(2)(B); 47 C.F.R. § 76.1002(b). Thus, a vertically integrated programmer that withholds programming from a recent entrant with a minimal subscriber base but chooses to offer the programming to all other competitive MVPDs in the market could be found in violation of the program access rules based on an unreasonable refusal to sell. *See First Report and Order*, 8 FCC Rcd at 3412-13, ¶ 116 (stating that non-price discrimination could include a vendor's refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor). As discussed below, while other program access provisions in Section 628 would remain if Section 628(c)(2)(D) were to sunset, we find that these other provisions are insufficient to preserve and protect competition at this time. *See infra* n. 320.

[310] *See* NCTA Reply Comments 2, 4; *see also* Comcast Comments at 5 n.5.

[311] *See* Cablevision Comments at 15-16; Cablevision Reply Comments at 11; Time Warner Reply Comments at 21.

diversity.[312] Thus, the more salient point for our analysis is not whether individual competitors will remain in the market if the exclusive contract prohibition were to sunset, but how competition in the video distribution market will be impacted if the exclusive contract prohibition were to sunset. We find that absent the exclusive contract prohibition, the ability of competitive MVPDs, including large and established companies, to compete will be severely hindered, thereby adversely impacting the market for distribution of video services.[313] Cablevision argues that a competitive MVPD could engage in competitive countermeasures in reaction to a cable-affiliated programmer's decision to withhold "must have" programming, such as lowering prices, acquiring other programming on an exclusive basis, or launching new services of its own.[314] We find, however, that these countermeasures would not be sufficient to deprive cable-affiliated programmers of the incentive to withhold programming or to mitigate the impact to the competitive MVPD of being unable to offer subscribers essential programming. The record reflects that, despite the availability of these countermeasures, cable-affiliated programmers have withheld programming from competitive MVPDs and in two instances – San Diego and Philadelphia – that such withholding has had a material adverse impact on competition in the video distribution market.[315] As the Commission concluded in the *2002 Sunset Order*, the prohibition on exclusivity therefore remains necessary to preserve and protect diversity in distribution of video programming.

62. We disagree with cable MSOs that argue that enforcement of antitrust laws will be sufficient to address anticompetitive use of exclusive contracts.[316] In passing the exclusive contract prohibition in Section 628(c)(2)(D), Congress concluded the opposite by requiring the Commission to enforce a presumptive ban on exclusive contracts rather than relying on reactive application of antitrust laws to existing exclusive arrangements.[317] Moreover, the legislative history of the 1992 Cable Act reflects Congress's concern regarding the "prohibitive cost of pursuing an antitrust suit."[318] As the Commission emphasized in the *2002 Extension Order*, "Congress already determined that antitrust laws were not a viable alternative for achieving the government's goals in this instance."[319] As discussed above, we do not believe that Congress's goal of achieving competition and diversity in the video distribution marketplace has been achieved. Accordingly, we believe that continued reliance on the exclusive contract prohibition in Section 628(c)(2)(D) rather than reliance solely on antitrust laws better serves the intent of Congress.[320]

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[312] 47 U.S.C. § 548(c)(2)(D); *see 2002 Extension Order,* 17 FCC Rcd at 12150, ¶ 58 and 12152, ¶ 62; *see infra* Section III.A.3.c.

[313] *See 2002 Extension Order,* 17 FCC Rcd at 12152-53, ¶ 63.

[314] *See* Cablevision Comments at 8, 17; Cablevision Reply Comments at 11-12.

[315] *See supra* ¶ 39 (discussing impact on competitive MVPD subscribership from withholding of cable-affiliated programming) and ¶ 49 (discussing evidence of withholding of cable-affiliated programming from competitive MVPDs).

[316] *See* Comcast Comments at 23-24; Comcast Reply Comments at 22.

[317] *See* CA2C Reply Comments at 3; EchoStar Reply Comments at 15-16; Qwest Reply Comments at 7 n.22; Verizon Reply Comments at 6. EchoStar notes that antitrust enforcement is slow, time-consuming, and provides no means to check anticompetitive behavior prospectively, other than through a stay. EchoStar Reply Comments at 15.

[318] S. Rep. No. 102-92, at 29 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1162.

[319] *See 2002 Extension Order,* 17 FCC Rcd at 12143, ¶ 45 n.138.

[320] As we concluded in the *2002 Extension Order*, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) of the Communications Act are not adequate substitutes for the particularized protection afforded under Section (continued….)

63. We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming and allowing for "product differentiation" among distributors.[321] We do not believe, however, that these purported benefits outweigh the harm to competition and diversity in the video distribution marketplace that would result if we were to lift the exclusive contract prohibition. In addition, the Commission's rules permit cable-affiliated programmers to seek approval to enter into an exclusive contract based on a demonstration that the exclusive arrangement serves the public interest consistent with factors established by Congress.[322] Despite the option to seek approval to enter into exclusive contracts, only ten exclusivity petitions have been filed in the fifteen years since enactment of Section 628(c)(2)(D) in the 1992 Cable Act. Of these petitions, two were granted,[323] three were denied,[324] and five were dismissed at the request of the parties. Of the three exclusivity petitions that have been denied, all of the networks that were the subject of these petitions (Court TV, Speed, and Sci-Fi Channel) have flourished despite the lack of exclusivity.[325]

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628(c)(2)(D). *See 2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n. 206. We stated that (i) Section 628(c)(2)(D) places the burden on the party seeking exclusivity to show that an exclusive contract meets the statutory public interest standard and that no other program access provision provides this protection; (ii) these other provisions were all enacted as part of the 1992 Cable Act, indicating that, despite the existence of these other program access provisions, Congress found the exclusive contract prohibition to be necessary to preserve and protect competition and diversity; (iii) as compared to Section 628(c)(2)(D), Section 628(b) carries with it an added burden "to demonstrate that the purpose or effect of the conduct complained of was to 'hinder significantly or to prevent' an MVPD from providing programming to subscribers or customers"; (iv) conduct of undue influence necessary to establish a violation of Section 628(c)(2)(A) "may be difficult for the Commission or complainants to establish"; and (v) the prohibition of "non-price discrimination" in Section 628(c)(2)(B) requires the complainant to demonstrate the conduct was "unreasonable" which may be difficult to establish. *See id*. (citing *First Report and Order*, 8 FCC Rcd at 3424, ¶ 145). No commenter provides any basis for us to revisit these conclusions. Moreover, we note that some competitive MVPDs argue that allowing the exclusive contract prohibition to sunset would provide cable-affiliated programmers with an incentive to enter into exclusive contracts with their affiliated cable operators to avoid allegations of unfair acts or practices or discrimination with respect to their dealings with unaffiliated distributors. *See* EchoStar Comments at 11 n.22; USTelecom Comments at 13.

[321] *See* Cablevision Comments at 29 and Appendix B at 2 (arguing that exclusivity leads to beneficial "product differentiation," whereby creators and distributors respond to exclusivity strategies of their rivals by producing and distributing distinct content offerings that enable them to maintain a unique presence in the marketplace); Comcast Comments at 13-18. Comcast notes that its competitor, DIRECTV, has used exclusive arrangements with various sports leagues as a competitive tool to attract customers away from cable operators. *See* Comcast Comments at 18.

[322] 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4).

[323] *See New England Cable News Channel, Memorandum Opinion and Order*, 9 FCC Rcd 3231 (1994); *NewsChannel, Memorandum Opinion and Order*, 10 FCC Rcd 691 (CSB, 1994).

[324] *See Time Warner Cable*, Memorandum Opinion and Order, 9 FCC Rcd 3221, 3230, ¶ 55 (1994) (denying exclusivity petition for Courtroom Television ("Court TV")); *Outdoor Life Network and Speedvision Network*, Memorandum Opinion and Order, 13 FCC Rcd 12226, 12242, ¶ 28 (CSB, 1998) (denying exclusivity petition for the Outdoor Life Network ("OLN") and Speedvision Network ("Speedvision")); *Cablevision Industries Corp. and Sci-Fi Channel*, Memorandum Opinion and Order, 10 FCC Rcd 9786, 9791, ¶ 32 (CSB, 1995) (denying exclusivity petition for the Sci-Fi Channel).

[325] The following data demonstrates that the three programming networks for which exclusivity was denied (Court TV, Speed, and Sci-Fi Channel) have prospered despite the lack of exclusivity. Court TV's subscribership increased from 16.1 million in 1994 to 87.9 million in 2006, and its prime-time ratings increased from 0.15 in 1994 to 0.81 in 2005. *See* Kagan Research, LLC, *Economics of Basic Cable Networks – 13th Annual Edition* at 37-38, 50-52 (2007) ("*Kagan Report 13th Edition*"); Kagan Research, LLC, *Economics of Basic Cable Networks – 9th Annual Edition* at 42, 44 (2003) ("*Kagan Report 9th Edition*"). OLN's (now known as Versus) subscribership increased from 18 (continued….)

c. Impact on Programming

64. We find above that the exclusive contract prohibition continues to be necessary to preserve and protect diversity in the distribution of programming.[326] While cable MSOs contend that the exclusive contract prohibition reduces incentives for cable operators and competitive MVPDs to create and invest in new programming, we find no evidence to support this theory.[327] To the contrary, the number of vertically integrated satellite-delivered national programming networks has more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect[328] and has continued to increase since 2002 when the Commission last examined the exclusive contract prohibition.[329] Moreover, the number of national programming networks has increased by almost 400 percent since

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million in 1998 to 67.8 million in 2006. *See Kagan Report 13th Edition* at 37-38, 50-52. Speedvision's (now known as Speed) subscribership increased from 20 million in 1998 to 65.9 million in 2006. *See id*. The Sci-Fi Channel's subscribership increased from 27.4 million in 1995 to 88.1 million in 2006, and its prime-time ratings increased from 0.65 in 1995 to 1.04 in 2005, making it the fifteenth-ranked programming network by prime-time ratings. *See Kagan Report 13th Edition* at 37-38, 50-52*; Kagan Report 9th Edition* at 42, 44; *see also 12th Annual Report*, 12 FCC Rcd at 2655, Table C-6; Qwest Reply Comments at 6-7 ("[N]otwithstanding the Commission's refusal to give them an exemption from Section 628(c)(2)(D)'s prohibition on exclusivity, [Speed and Versus] have grown to become two of the more popular 'niche-oriented' cable channels in circulation.").

[326] As we stated in the *2002 Extension Order*, while we recognize that the exclusive contract prohibition's impact on programming diversity is one component of our analysis, Congress directed that "our primary focus should be on preserving and protecting diversity in the *distribution* of video programming -- *i.e.*, ensuring that as many MVPDs as possible remain viable distributors of video programming." *See 2002 Extension Order,* 17 FCC Rcd at 12152, ¶ 62 (emphasis in original).

[327] Cablevision argues that the exclusive contract prohibition (i) deprives cable operators of the incentive to invest in new programming because the prohibition requires them to share the programming with their competitors; and (ii) deprives competitive MVPDs of the incentive to invest in programming because the prohibition provides them with access to programming developed by their competitors. *See* Cablevision Comments at 10, 27-29 and Appendix B at 26-27. Cablevision and Comcast also argue that some new MVPDs, such as AT&T and Verizon, have sufficient resources to invest their own programming. *See* Cablevision Comments at 5, 10, 29; Comcast Reply Comments at 6.

[328] *Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* First Report and Order*,* 9 FCC Rcd 7442, 7589-92 (1994) ("*1st Annual Report*") (56 vertically integrated national programming networks) *with 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157 (116 vertically integrated national programming networks).

[329] *Compare 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157 (104 vertically integrated national programming networks)) *with 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157 (116 vertically integrated national programming networks); *see* EchoStar Comments at 4 ("The number of new vertically integrated programming networks since 2002 described herein undercuts any suggestion that this prohibition prevents or limits the ability or desire of cable conglomerates to create new programming assets."); USTelecom Comments at 19; Verizon Reply Comments at 4 ("[N]o reasonable basis exists for the Commission to conclude that the exclusive contract prohibition has had or will have any adverse impact on the development of programming, particularly when experience proves otherwise."); *see also* Letter from Stephanie L. Podey, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, MB Docket Nos. 07-29, 06-189 (June 13, 2007), Attachment at 3 (stating that "Comcast continues to invest in new programming networks" and noting Comcast's partnering in 2006 with CSTV to launch The mtn., a national network dedicated to sports programming, as well as Comcast's investment in additional regional sports networks); EchoStar Comments at 7-8 (noting new vertically integrated cable networks launched since 2002).

1994[330] and by 80 percent since 2002.[331] There is also evidence that some competitive MVPDs have begun to invest in their own programming despite their ability to access cable-affiliated programming based on the exclusive contract prohibition and the program access rules.[332] Accordingly, we find no basis to conclude that extending the exclusive contract prohibition will create a disincentive for the creation of new programming.[333]

65. We are mindful that our decision to extend the exclusive contract prohibition must withstand an intermediate scrutiny test pursuant to First Amendment jurisprudence.[334] As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the exclusive contract prohibition in Section 628(c)(2)(D), the prohibition will survive intermediate scrutiny if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[335] For the reasons discussed herein, our decision to extend the exclusive contract prohibition satisfies this intermediate scrutiny test. First, in *Time Warner*, the court found that the governmental interest Congress intended to achieve in enacting the exclusive contract prohibition was "the promotion of fair competition in the video marketplace," and that this interest was substantial.[336] Moreover, the court noted Congress' conclusion that "the benefits of these provisions -- the increased speech that would result from fairer competition in the video programming marketplace -- outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming."[337] We disagree with cable MSOs to the extent they argue that the substantial government interest in achieving competition in the video distribution market has been met.[338] As discussed above, cable operators still have a dominant share of MVPD subscribers (approximately 67

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[330] *Compare 1st Annual Report,* 9 FCC Rcd at 7589-92 (107 satellite-delivered national programming networks) *with 12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157 (531 satellite-delivered national programming networks).

[331] *Compare 2002 Extension Order,* 17 FCC Rcd at 12131-32, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309-10, ¶ 157 (237 satellite-delivered national programming networks)) with *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157 (531 satellite-delivered national programming networks).

[332] For example, Verizon has invested in new programming for its FiOS TV service. In March 2007, Verizon announced that it was launching FiOS1, a local television channel for FiOS TV subscribers in the Washington, DC metropolitan area that offers local weather, traffic, news, sports, and community features. *See* FiOS1, Verizon's First Local TV Channel, Debuts in Washington, D.C., Metro Area, FiOS TV Subscribers to Get Local Information, Sports and Features All Day on FiOS1, http://newscenter.verizon.com/press-releases/verizon/2007/fios1-verizons-first-local.html (last visited July 27, 2007). Verizon also announced that it expects to launch similar channels in other markets this year. *See id*.

[333] *See 2002 Extension Order,* 17 FCC Rcd at 12153, ¶ 64.

[334] *See* Cablevision Comments at 10; Comcast Reply Comments at 3; NCTA Reply Comments at 8-10; Time Warner Reply Comments at 20-21.

[335] *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)).

[336] *Id*. Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), § 2(a)(6).

[337] *Time Warner Entertainment Co. L.P.,* 93 F.3d at 979 (citing S. Rep. No. 92, 102d Cong., 2d Sess. 4 (1991), at 26-28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159-61).

[338] *See* NCTA Reply Comments at 9-10.

percent), have raised prices in excess of inflation despite the emergence of new competitors,[339] and still own significant programming networks.[340] Accordingly, we conclude that competition and diversity in the video distribution market has not reached the level at which Congress intended the exclusive contract prohibition would sunset.[341] Second, in *Time Warner*, the court held that the governmental objective in adopting the exclusive contract prohibition in Section 628(c)(2)(D) was unrelated to the suppression of free speech.[342] In this *Order*, we extend the exclusive contract prohibition for an additional five years but do not otherwise modify the prohibition. Thus, the prohibition remains unrelated to the suppression of free speech, as the D.C. Circuit Court of Appeals previously held.[343] Third, in *Time Warner*, the court rejected claims that the exclusive contract prohibition was not narrowly tailored to achieve the stated government interest.[344] In this *Order*, we extend the exclusive contract prohibition for a term of five years but do not otherwise modify the prohibition. Thus, the prohibition remains narrowly tailored to meet the statute's objective, and any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that objective.[345]

66. We note that cable MSOs argue that the exclusive contract prohibition is not narrowly tailored because it is allegedly both overinclusive (in that it applies to "new," "unpopular," and other types of programming that are arguably not essential to the viability of competition in the video distribution market) and underinclusive (in that it does not apply to certain non-cable-affiliated programming that may be necessary for viable competition in the MVPD market).[346] We reject proposals to modify the scope of the exclusive contract prohibition for the reasons discussed in Section III.A.4. Moreover, we note that the exclusive contract prohibition in Section 628(c)(2)(D) is not absolute. Rather, cable-affiliated programmers may seek approval to enter into exclusive programming contracts that satisfy the criteria set forth by Congress in Section 628(c)(2) and (4).[347] Thus, requests to enter into exclusive contracts for "new," "unpopular," and other types of programming cited by cable MSOs as non-essential to the viability of competition can be addressed through individual exclusivity petitions.[348] Finally, as discussed above, we have found no evidence that the exclusive contract prohibition is creating

[339] *See 2006 Cable Price Report*, 21 FCC Rcd at 15087-88, ¶ 2 ("Overall, cable prices increased more than 5 percent last year and by 93 percent since the period immediately prior to Congress's enactment of the Telecommunications Act of 1996. Expanded basic prices rose more than 6 percent or twice the rate of inflation last year.").

[340] *See supra* Section III.A.2.

[341] *See* AT&T Reply Comments at 13 n.48 (stating that the exclusive contract prohibition continues to materially advance an important or substantial government interest).

[342] *See Time Warner Entertainment Co. L.P.,* 93 F.3d at 978 ("[T]he vertically integrated programming provisions apply to only a limited number of companies for a perfectly legitimate reason: the antitrust concerns underlying the statute arise precisely because the number of vertically integrated companies is small. The vertically integrated programmer provisions are thus not 'structured in a manner that raise[s] suspicions that their objective was, in fact, the suppression of certain ideas.'" (*quoting Turner*, 512 U.S. at 660, 114 S.Ct. at 2468)).

[343] *See id*. at 978.

[344] *See id*. at 978-79.

[345] *See id*.

[346] *See* Comcast Reply Comments at 3; NCTA Reply Comments at 9.

[347] 47 U.S.C. § 548(c)(2) and (4).

[348] As noted above, only ten exclusivity petitions have been filed to date. *See supra* ¶ 63. Of these petitions, two were granted, three were denied, and five were dismissed at the request of the parties.

a disincentive for the creation of new programming.[349] Despite claims that the exclusive contract prohibition deprives cable operators and others of the incentive to invest in new programming, thereby restricting the creation of new programming, the record reflects the opposite.[350] Thus, contrary to these contentions, the prohibition has fostered, not restricted, speech.

4. Scope of Exclusive Contract Prohibition

67. Various commenters argue that the exclusive contract prohibition is both overinclusive and underinclusive with respect to the type of programming and MVPDs it covers. Some commenters ask the Commission to either narrow or expand the scope of the prohibition accordingly. Some cable MSOs argue that this alleged overinclusiveness and underinclusiveness render the exclusive contract prohibition arbitrary and capricious under the Administrative Procedures Act.[351] As discussed below, we decline to either narrow or expand the exclusive contract prohibition.

a. Narrowing the Prohibition

(i) Narrowing Based on Status of Programming Network

68. For the reasons discussed below, we decline to narrow the scope of the exclusive contract prohibition based on the status of the programming network. The exclusive contract prohibition in Section 628(c)(2)(D) and the implementing rules pertain to all satellite-delivered programming networks that are vertically integrated with a cable operator, regardless of their popularity. Some cable MSOs argue that the prohibition is thus overinclusive because it includes new and unpopular programming networks that are not essential to the ability of an MVPD to compete. These cable MSOs ask the Commission to narrow the scope of the exclusion contract prohibition based on the status of the programming network by (i) allowing exclusive arrangements for new and unpopular programming;[352] (ii) allowing exclusive arrangements for regional non-sports programming;[353] and (iii) allowing exclusive arrangements for RSNs in DMAs served by more than one unaffiliated RSN.[354]

69. As an initial matter, we note that in adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to all cable-affiliated programming. Congress did not distinguish between different types of cable-affiliated programming. Instead, Congress in Section 628(c)(4) established criteria whereby cable-affiliated programmers could petition the Commission for authority to enter into exclusive arrangements despite the general rule prohibiting all such exclusive

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[349] *See supra* ¶ 63.

[350] *See id.*

[351] *See, e.g.*, Cablevision Comments at 30-32; Comcast Comments at 24-26; Comcast Reply Comments at 25-28. These cable MSOs also raise First Amendment concerns, which we address above in Section III.A.3.c.

[352] *See* Cablevision Comments at 31 (arguing that the following types of programming cannot be considered necessary to protect competition: (i) national networks with low average prime-time ratings; (ii) new programming services since they cannot be considered essential to the "continued" viability of competing MVPDs; and (iii) cable networks that are not deemed important by market participants to warrant carriage to a significant number of households).

[353] *See id*. (stating that the Commission concluded in the *Adelphia* proceeding that access to regional non-sports programming is not essential to competition, citing *Adelphia Order* (21 FCC Rcd at 8279, ¶ 169)).

[354] *See id*. (arguing that where RSNs are competing for sporting events, there is little risk that an exclusive arrangement for one network will foreclose competition).

arrangements.[355] Requests to remove certain cable-affiliated programming networks from the prohibition can be addressed through these individual exclusivity petitions.[356] Accordingly, as the Commission concluded in the *2002 Extension Order*, we believe that treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusive contract prohibition is consistent with Section 628(c)(2)(D) and the definitions set forth in Sections 628(i)(1) and (3).[357] Moreover, no commenter has provided a rational and workable definition of "must have" programming that would allow us to apply the exclusive contract prohibition to only this type of programming. In the *2002 Extension Order*, the Commission recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition" and further noted that any attempt to distinguish between different types of cable-affiliated programming is likely to raise Constitutional concerns.[358] Cable MSOs asking us to narrow the scope of the prohibition suggest no workable mechanisms for alleviating these concerns.

(ii) Narrowing Based on Status of Cable Operator

70. For the reasons discussed below, we decline to narrow the scope of the exclusive contract prohibition based on the status of the cable operator. Cable MSOs argue that we should narrow the exclusive contract prohibition by allowing certain types of exclusive arrangements based on the status of the cable operator, such as (i) those involving an affiliated cable operator whose network passes only a small number of households throughout the nation;[359] (ii) those between a cable operator and an affiliated programming network outside the footprint of the affiliated cable operator;[360] and (iii) those involving affiliated cable operators that face competition from both DBS and telephone companies.[361]

71. In adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to *all* cable operators. Congress did not distinguish between different types of cable operators for purposes of Section 628(c)(2)(D). Moreover, in adopting the exclusive contract prohibition, Congress has already delineated a geographic demarcation applicable to the prohibition – "areas served

[355] *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[356] We remind those cable MSOs urging exemption of certain types of programming from the exclusive contract prohibition that the Commission will entertain individual exclusivity petitions as Congress mandated. *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4). In the *2002 Extension Order*, we provided an example of one type of vertically integrated programming that may qualify for exclusivity. *See 2002 Extension Order,* 17 FCC Rcd at 12135-36, ¶ 25 ("if a vertically integrated programmer contemplates the introduction of innovative services with limited or niche audiences and believes that these services will not be economically viable without a period during which they are offered on an exclusive basis, we encourage such programmer to petition the Commission to approve a period of exclusivity").

[357] *See 2002 Extension Order,* 17 FCC Rcd at 12156, ¶ 69.

[358] *Id*.

[359] *See* Cablevision Comments at 30-31.

[360] *See* Cablevision Comments at 30-31; Time Warner Reply Comments at 20.

[361] *See* Cablevision Comments at 31-32.

by a cable operator."[362] Congress did not provide that the exclusive contract prohibition should vary based on the competitive circumstances in individual geographic areas served by a cable operator.[363]

72. We also find that these attempts to narrow the exclusive contract prohibition would harm competition in the video distribution marketplace. One of the key anticompetitive practices that the exclusive contract prohibition addresses is the practice of leveraging cable's market power collectively by withholding affiliated programming from rival MVPDs while selling the affiliated programming to other cable operators which do not compete with one another. A cable operator may gain by weakening a current or potential rival (such as a DBS operator) even in markets that the cable operator itself does not serve.[364] Thus, proposals to narrow the exclusive contract prohibition by allowing exclusive arrangements outside of the footprint of the affiliated cable operator or with cable operators whose networks pass only a small number of households throughout the nation will impede competition in the video distribution marketplace. We similarly find that allowing exclusive arrangements for affiliated cable operators that face competition from both DBS and telephone companies would harm competition in the video distribution marketplace. We conclude herein that a cable operator will not lose the incentive and ability to enter into an exclusive arrangement in a given geographic area simply because it faces competition from both DBS operators and telephone companies in that area. As discussed above, the key consideration is the market share of the cable operator relative to other competitors. Indeed, in areas where a telephone company has recently entered the video distribution market, its market share will be minimal, providing cable operators with the ability and incentive to enter into exclusive arrangements that adversely impact competition.[365]

(iii) Narrowing Based on Status of Competitive MVPD

73. For the reasons discussed below, we decline to narrow the exclusive contract prohibition by precluding certain competitive MVPDs from benefiting from the prohibition. Comcast and Cablevision ask us to narrow the exclusive contract prohibition by precluding certain competitive MVPDs from benefiting from the prohibition, such as competitive MVPDs that (i) have been in the MVPD market

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[362] 47 U.S.C. § 548(c)(2)(D); *see also 2002 Extension Order,* 17 FCC Rcd at 12156-57, ¶ 70.

[363] We again note that through individual exclusivity petitions, the Commission may determine (in accordance with statutory criteria) whether a particular exclusive contract, otherwise prohibited under Section 628(c)(2)(D), is in the public interest. *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[364] *See 2002 Extension Order*, 17 FCC Rcd at 12140-41, ¶¶ 36-39; *see also* DIRECTV Comments at 8-9; CA2C Reply Comments at 7.

[365] *See supra* ¶ 60 (discussing incentives of vertically integrated cable programmers to withhold programming from recent entrants in the video marketplace).

for more than five years;[366] (ii) have extensive resources;[367] or (iii) enter into exclusive contracts for programming.[368]

74. Section 628 makes no distinction among MVPDs of the kind suggested by these commenters. Moreover, we find that adopting such restrictions on the entities that can benefit from the prohibition will limit competition in the video distribution market[369] and will result in no discernible public interest benefits.[370] The resources of competitors or the number of years they have spent in the market has no bearing on the goal of Section 628(c)(2)(D) to preclude exclusive contracts in order to facilitate competition in the video distribution market. Rather, if cable operators have exclusive access to non-substitutable content that is essential for viable competition and they have the incentive to withhold such content, the amount of resources of competitive MVPDs or their longevity in the market will not be able to overcome that competitive advantage.[371] Comcast asks us to prevent competitive MVPDs that themselves enter into exclusive programming contracts from being the beneficiaries of the exclusive contract prohibition applied to cable-affiliated programmers.[372] Section 628, however, does not exempt cable operators from its restrictions based on the contracting practices of non-cable MVPDs.

b. Expanding the Prohibition

(i) Expanding the Prohibition to Non-Cable-Affiliated Programming

75. For the reasons discussed below, we decline to apply an exclusive contract prohibition to non-cable-affiliated programming. The exclusive contract prohibition in Section 628(c)(2)(D) and the implementing rules pertain only to programming networks that are vertically integrated with a "cable

[366] *See* Comcast Comments at 26 (stating that, after five years in the video distribution business, "a competitor should be able to sink or swim on its own"); *see also* Cablevision Comments at 5 ("Cablevision faces competition from two DBS providers, each of which has a subscriber base at least four times larger than its own . . . . Each of those entities has the ability to invest in its own programming, just as Cablevision did.").

[367] *See* Comcast Comments at 26 (arguing that the benefits of the exclusive contract prohibition should not be available to a company with over 10 million customers or to a company that is part of an enterprise with a market capitalization of over $100 billion); *see also* Cablevision Comments at 5 ("Cablevision faces competition from . . . Verizon and AT&T, whose market capitalizations are 10 and 25 times larger, respectively, than Cablevision's. Each of those entities has the ability to invest in its own programming, just as Cablevision did.").

[368] *See* Comcast Comments at 26.

[369] *See* AT&T Reply Comments at 12-13 (stating that proposals by Cablevision and Comcast to narrow the exclusive contract prohibition "would gut the rule precisely where it might be of use to competitors with a viable opportunity to offer consumers a real alternative to cable: those with experience, those with capital, and those with a foothold in the market"); CA2C Reply Comments at 9 (stating that these proposals would "ensure that the rules have no application to any significant competitor" that Cablevision and Comcast face, thereby "making sure the rules are meaningless"); Verizon Reply Comments at 12-13.

[370] *See supra* Section III.A.3.c (concluding that there is no evidence that the exclusive contract prohibition has had an adverse impact on the incentives for creation of new programming).

[371] *See* Verizon Reply Comments at 11-12 ("That a new video entrant may have a large market capitalization or a sizeable number of telephone customers does not ensure competitive success in the video market when the entrant cannot offer the programming subscribers want to see.").

[372] *See* Comcast Comments at 26.

operator," as that term is defined in the Communications Act.[373] Competitive MVPDs, as well as some cable MSOs,[374] argue that the prohibition is thus underinclusive because it does not pertain to certain non-cable-affiliated programming that is necessary for MVPDs to compete. They ask the Commission to prohibit exclusive contracts for (i) all "must have" programming networks, regardless of whether the network is affiliated with a cable operator;[375] and (ii) all programming networks vertically integrated with any MVPD, including DBS operators and new MVPDs such as AT&T and Verizon.[376]

76. As an initial matter, to the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming and, thus, no further action is required on our part.[377] We have previously explained that the exclusive contract prohibition in Section 628(c)(2)(D) does not extend to unaffiliated programming networks and programming networks affiliated with non-cable MVPDs, such as DBS operators.[378]

77. Moreover, the record before us in this proceeding does not provide sufficient evidence upon which to conclude that non-cable-affiliated programming is being withheld from MVPDs to a significant extent or that such withholding is adversely impacting competition in the video distribution market. Accordingly, we seek comment on this issue in the *NPRM*. We agree with DIRECTV that the economic premise underlying the exclusive contract prohibition in Section 628(c)(2)(D) is that the cable industry's dominance of the video distribution market enables cable operators to successfully withhold affiliated programming from rival MVPDs in order to limit competition in the distribution market.[379] The record before us in this proceeding does not provide us with adequate evidence to conclude that those exclusive programming arrangements entered into by non-cable MVPDs have harmed competition in the video distribution market.[380] Because we have not been presented with sufficient evidence in this

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[373] *See* 47 U.S.C. § 522(5) (defining a "cable operator"); *id*. § 522(7) (defining a "cable system"); *Definition of a Cable System*, 5 FCC Rcd 7638, 7638-39, ¶¶ 6-11 (1990).

[374] *See, e.g*., Comcast Comments at 24 ("[T]o the extent that MVPDs cannot survive without access to certain programming, it is irrelevant whether that programming is 'affiliated;' what matters is whether that programming is 'must have' in order to compete."); *see also* Cablevision Comments at 27.

[375] *See* NCTA Comments at 4-5; RCN Comments at 12-18; SureWest Comments at 9; ACA Reply Comments at 7-8; RCN Reply Comments at 12-13; SureWest Reply Comments at 8-9.

[376] *See* ACA Comments at 2, 8-9, 11-13; ACA Reply Comments at 6-7; SureWest Reply Comments at 8.

[377] Moreover, as AT&T notes, Section 628(j) of the Communications Act provides that any provision of Section 628 that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. *See* 47 U.S.C. § 548(j); *see also* AT&T Reply Comments at 6 n.19.

[378] *See 2002 Extension Order,* 17 FCC Rcd at 12158, ¶ 74 ("The program access rules, including the exclusivity prohibition, apply only to satellite-delivered program services in which a cable operator has an attributable interest.").

[379] *See* DIRECTV Reply Comments at 3 ("Section 628's prohibition on exclusivity is specific for a reason. . . . Congress never considered exclusivity *per se* to be anticompetitive. Congress found, however, that, because cable operators possess market power, programmers affiliated with those cable operators could harm emerging competition by withholding affiliated programming from cable's rivals.") (footnotes omitted); *see also* Broadcast Networks Reply Comments at 3-4 ("[T]he program access rules are based on the narrow antitrust concern that a vertically-integrated programmer might withhold programming in order to prevent or hinder competition to that programmer's MVPD operations. It is axiomatic that this concern has always been and remains entirely non-existent for non-vertically integrated programming.") (footnotes omitted).

[380] The one example of an exclusive programming arrangement entered into by a competitive MVPD is DIRECTV's exclusive deals for certain national sports programming with the National Football League, college basketball,
(continued….)

proceeding to consider a rule that prohibits exclusive contracts for non-cable-affiliated programming, we need not address here our statutory authority to apply an exclusive contract prohibition to such programming.[381]

(ii) Expanding the Prohibition to Terrestrially Delivered Programming

78. We decline to apply an exclusive contract prohibition to terrestrially delivered programming at this time. Some competitive MVPDs argue that the Commission should apply the exclusive contract prohibition to terrestrially delivered programming networks, citing various provisions of the Communications Act in addition to Section 628(c) for statutory support.[382] The exclusive contract prohibition in Section 628(c)(2)(D) pertains only to vertically integrated "satellite cable programming" and vertically integrated "satellite broadcast programming."[383] The Communications Act defines both terms to include only programming transmitted or retransmitted by satellite for reception by cable

(Continued from previous page)
Major League Baseball, and NASCAR. *See* ACA Comments at 9 n.17; RCN Comments at 17-18. Unlike in the case of cable operators (*see supra* ¶ 52), there is no evidence in the record to conclude that a competitive MVPD can make exclusivity a profitable strategy over the long term. Moreover, commenters have not provided any evidence of competitive harm resulting from their inability to offer this programming. Unlike in the case of cable-affiliated regional sports programming, we have no evidence that the inability to access this sports programming has impacted MVPD subscribership. *See supra* ¶ 39 (discussing impact on MVPD subscribership of inability to access cable-affiliated RSNs).

[381] Commenters cite provisions of the Communications Act other than Section 628(c)(2)(D) as providing the Commission with statutory support to apply an exclusive contract prohibition to non-cable-affiliated programming. *See* RCN Comments at 16-17 (citing Sections 4(i) and 628(b) of the Communications Act); SureWest Comments at 9 n.17 (referring to unspecified provisions of the Communications Act). We found no basis to consider DBS operators as "cable operators" as defined in Section 602 for purposes of the exclusive contract prohibition in Section 628(c)(2)(D), as requested by RCN. *See* RCN Comments at 17 n.48. As we have concluded previously, the definition of a "cable system" and a "cable operator" in the Communications Act does not include DBS. *See* 47 U.S.C. § 522(5) (defining a "cable operator"); *id*. § 522(7) (defining a "cable system"); *Definition of a Cable System*, 5 FCC Rcd at 7638-39, ¶¶ 6-11; *see also* DIRECTV Reply Comments at 5-6.

[382] *See* SureWest Comments at 7-8 (citing Section 4(i) of the Communications Act); Verizon Comments at 14 (same); *id*. at 14 (citing Section 303(r) of the Communications Act); SureWest Comments at 8 (citing Section 601(6) of the Communications Act); RICA Comments at 5 (citing Section 612(g) of the Communications Act); *id*. at 5 (citing Section 616(a) of the Communications Act); SureWest Comments at 7 (citing Section 628(b) of the Communications Act); *see also* AT&T Comments at 9 n.24; BSPA Comments at 16-18; EchoStar Comments at 4. The Commission previously declined to address arguments regarding the Commission's statutory authority to address terrestrially delivered programming under Sections 4(i) and 303(r) of the Communications Act. *See 1998 Program Access Order*, 13 FCC Rcd at 15856, ¶ 71 n.222. The Commission has also stated that "given that 628 does not by its terms apply to terrestrially-delivered programming, it is not appropriate for the Commission to exercise ancillary jurisdiction to extend, in the context of a complaint proceeding, program access regulation to terrestrially-delivered programming." *RCN Telecom Services v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12055, ¶ 18 (2001). The Commission has stated "there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming." *Id*. at 12053, ¶ 15; *DIRECTV*, 15 FCC Rcd at 22807; *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* 11 FCC Rcd 18223, 18325, ¶ 197 n.451 (1996) ("we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs").

[383] 47 U.S.C. § 548(c)(2)(D).

operators.[384] Based on these definitions as well as the legislative history of the 1992 Cable Act, the Commission has previously concluded that terrestrially delivered programming (such as programming delivered by programmers to cable operators by fiber) is "outside of the direct coverage" of the exclusive contract prohibition in Section 628(c)(2)(D).[385] As we have concluded previously, we decline to apply the exclusive contract prohibition to terrestrially delivered programming pursuant to Section 628(c)(2)(D).[386] Commenters have failed to provide any new evidence or arguments that would lead us to reconsider our previous conclusion that terrestrially delivered programming is "outside of the direct coverage" of Section 628(c)(2)(D).[387] We continue to believe that the plain language of the definitions of "satellite cable programming" and "satellite broadcast programming" as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).[388] In the *NPRM*, we seek further comment on whether other provisions of the Communications Act provide the Commission with statutory authority to extend our program access rules, including an exclusive contract prohibition, to terrestrially delivered programming, and whether we should extend the prohibition to cover such programming.[389]

5. Length of New Term

79. We conclude that the exclusive contract prohibition will be extended for five years subject to review during the last year of this extension period (*i.e*., between October 2011 and October 2012). As we concluded in the *2002 Extension Order*, we do not believe that establishing a fixed date for sunset of the exclusive contract prohibition without further review will serve the public interest. Section 628(c)(5) does not expressly state a term for how long the prohibition should continue if we decide that it should be extended, thereby providing the Commission with the discretion to prescribe this period.[390] In the *2002 Extension Order*, the Commission stated that establishing a fixed date for sunset of the prohibition without conducting a further proceeding to determine whether the prohibition is still "necessary to preserve and protect competition and diversity in the distribution of video programming" is not consistent with Congressional intent.[391] We cannot predict now how future changes in the video distribution market will impact the continued need for the exclusive contract prohibition. Rather, we

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[384] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

[385] *See DIRECTV, Inc. v. Comcast Corp. et al.,*15 FCC Rcd 22802, 22807, ¶ 12 (2000); *see also 2002 Extension Order,* 17 FCC Rcd at 12158, ¶ 73.

[386] *See* 2002 *Extension Order*, 17 FCC Rcd at 12158, ¶ 73; *DIRECTV, Inc.*, 15 FCC Rcd at 22807, ¶ 12; *1998 Program Access Order*, 13 FCC Rcd at 15856, ¶ 71; *see also* AT&T Comments at 9 n.24; SureWest Comments at 7-8; SureWest Reply Comments at 6-8.

[387] *DIRECTV, Inc.*, 15 FCC Rcd at 22807, ¶ 12; *see* Comcast Reply Comments at 29-30.

[388] *See* 2002 *Extension Order*, 17 FCC Rcd at 12158, ¶ 73.

[389] *See infra* Section IV.B.

[390] *See 2002 Extension Order,* 17 FCC Rcd at 12159-60, ¶ 77.

[391] *See id.* at 12160, ¶ 78; *see also* AT&T Reply Comments at 13 n.50; EchoStar Reply Comments at 13 n.22.

believe that providing for a limited extension subject to further review is a more prudent approach and comports better with Congressional intent than a predetermined sunset date.

80. In the *Notice*, we sought comment on whether the exclusive contract prohibition should automatically sunset upon a specific event or events in the marketplace.[392] Commenters argue that the exclusive contract prohibition should not sunset upon the materialization of specific marketplace events.[393] OPASTCO/ITTA argues that technological developments and marketplace evolutions are occurring too frequently for the Commission to predict when the rule should sunset without a thorough review.[394] We agree that the evolving nature of the video distribution and programming markets makes it difficult if not impossible to determine in this proceeding what specific marketplace events would demonstrate that competition in the MVPD market is sufficient such that the exclusive contract prohibition can sunset. We note that commenters have not provided adequate suggestions as to such marketplace events. As discussed above, we believe that a more appropriate approach that is supported by Congressional intent is to continue to assess the developments in the video distribution and programming markets to determine if the market has evolved in a way that would allow us to abolish the exclusive contract prohibition.

81. As the Commission concluded in the *2002 Extension Order*, we will review whether the exclusive contract prohibition remains necessary during the last year of the five-year extension. We believe that five years could be a sufficient amount of time for competition to develop in the video distribution and programming markets.[395] Given the marketplace developments over the last five years, such as the emergence of telephone companies into the video distribution market as well as other pro-competitive trends, including an increase in the number of programming networks, a decrease in the percentage of popular national and regional networks that are vertically integrated with cable operators, and an increase in the market penetration of MVPDs that compete with incumbent cable operators, we conclude that this review of the continuing necessity of the exclusivity prohibition has been a useful exercise of Commission resources. Accordingly, we believe that five years is an appropriate period of time to revisit the exclusivity prohibition. We also emphasize that, if adequate competition emerges before five years, the Commission could initiate its review earlier either on its own motion or in response to a petition.[396] Moreover, we will continue to evaluate petitions for exclusivity under the public interest factors established by Congress.[397]

6. Other Programming Issues

82. Small and rural telephone MVPDs raise additional concerns in their comments regarding the difficulties they face in trying to obtain access to programming, such as tying of desired with undesired programming and unwarranted security requirements.[398] We find that these concerns are

[392] *See Notice*, 22 FCC Rcd at 4258, ¶ 11.

[393] *See* EATEL Video Comments at 5; OPASTCO/ITTA Comments at 3-5; SureWest Comments at 2-4.

[394] *See* OPASTCO/ITTA Comments at 5.

[395] A five-year extension was supported by a wide-range of competitive MVPDs and consumer groups. *See* AT&T Comments at 5; BSPA Comments at 4; CA2C Comments at ii-iii, 2; DIRECTV Comments at 12; EATEL Video Comments at 5; EchoStar Comments at 10; NTCA Comments at 3; OPASTCO/ITTA Comments at 3-5; RICA Comments at 3; SureWest Comments at 2-4; Consumer Groups Reply Comments at 7.

[396] *See 2002 Extension Order,* 17 FCC Rcd at 12126, ¶ 5.

[397] *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[398] *See* NTCA Comments at 6-8; OPASTCO/ITTA Comments at 5-8.

beyond the scope of the programming issues raised in the *Notice*, which pertained only to the prohibition on exclusive contracts for satellite-delivered vertically integrated programming under Section 628(c)(2)(D) and the extension of that prohibition pursuant to Section 628(c)(5).[399] We did not seek comment on these issues in the *Notice* and, accordingly, do not have a sufficient record upon which to address these concerns in this *Order*. We seek further comment on these issues in the *NPRM*.

B. Modification of Program Access Complaint Procedures

83. As discussed below, we revise our program access complaint procedures. Specifically, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; codify the Commission's authority to issue default orders granting a complaint if a respondent fails to comply with discovery requests; and allow parties to choose, within 20 days of the close of the pleading cycle, to engage in voluntary commercial arbitration of their program access complaints.

84. In the *Notice*, the Commission sought comment on whether and how the procedures for resolving program access disputes under Section 628 should be modified.[400] In general, Comcast, NCTA, and Time Warner, as well as the Broadcast Networks, argue that changes to the Commission's program access complaint procedures are not necessary.[401] Comcast asserts that the Commission has carefully designed the program access procedural rules to provide effective relief by placing the least evidentiary burdens on those seeking relief and ensuring a speedy resolution of complaints; and that proposed changes to the process will make the program access complaint process more complicated, more costly, and more time-consuming.[402] NCTA asserts that most program access complaints have been disposed of relatively quickly or resulted in settlements.[403] Time Warner asserts that the appropriate way to resolve carriage disputes is for the parties to hash out their differences at the bargaining table, and the Commission should retain its existing policies and procedures, which encourage such negotiations.[404] Time Warner argues that expanding the program access rules would be inconsistent with the norm of relying on the marketplace to govern contracts between private parties.[405] Time Warner asserts that because the rules apply to only a very small number of program networks, these networks are forced to face a burdensome regulatory regime not encountered by the vast majority of their program network competitors.[406] The Broadcast Networks also opposes changes to the process.[407]

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[399] *See Notice*, 22 FCC Rcd at 4258, ¶ 12 ("we seek comment on any other issues appropriate to our inquiry in accordance with Section 628(c)(5)").

[400] *See Notice*, 22 FCC Rcd at 4259-4260, ¶¶ 13-16.

[401] *See* Comcast Comments at 26-28; Broadcast Networks Reply Comments at 3; NCTA Reply Comments at 10; Time Warner Reply Comments at 5.

[402] *See* Comcast Comments at 26-28.

[403] *See* NCTA Comments at 9.

[404] *See* Time Warner Reply Comments at 2.

[405] *See id*. at 5.

[406] *Id*.

[407] *See* Broadcast Networks Reply Comments at 3.

85. Parties recommending changes to the rules urge the Commission to focus on three areas of reform: acceleration of the deliberative process; providing a workable discovery mechanism; and protecting consumers during the pendency of complaint proceedings.[408] OPASTCO/ITAA argues that the current process is so costly and time-consuming that it is impracticable for rural carriers to pursue a program access complaint.[409] NTCA states that small rural carriers are at a disadvantage under the current procedures.[410] EchoStar relies on its own experience to conclude that the current process does not provide an effective regulatory backstop to protect against protracted negotiations that can result in loss of subscribers and significant financial uncertainty for competitive MVPDs.[411] In addition, EchoStar argues that the current procedures fail to provide a reliable means to ensure that all relevant documentation is available to Commission staff and the parties.[412] AT&T urges reforms to make Section 628 a more effective deterrent to anticompetitive conduct by cable incumbents.[413] Specifically, parties wishing to change the current process raise five issues: the length of the pleading cycle; discovery options; the parties' status pending resolution of complaints; time limits for resolving complaints; and arbitration as an alternate route to filing a complaint. We address all these issues below with the exception of the parties' status pending complaint resolution, which we address in the *NPRM*.

1. Pleading Cycle

86. In this *Order*, we retain our existing pleading cycle. The Commission's existing rules provide that an MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint with the Commission.[414] A complainant must first notify the programming vendor that it intends to file the complaint and allow the vendor 10 days to respond.[415] Once a complaint is filed, the cable operator or satellite programming vendor must answer within 20 days of service of the complaint.[416] Replies to the answer are due within 15 days of service of the answer.[417]

87. EchoStar asserts that a tighter pleading cycle will be more conducive to an efficient resolution of complaints.[418] It suggests a 10-day limit for filing an answer and a 5-day reply period.[419] It recommends that all service be electronic and that weekly status conferences be held to ensure progress.[420] AT&T suggests that the Commission apply its existing formal complaint process to program

[408] *See* EchoStar Comments at 30.

[409] *See* OPASTCO/ITAA Comments at 8.

[410] *See* NTCA Comments at 6.

[411] *See* EchoStar Comments at 13.

[412] *See id*. at 14.

[413] *See* AT&T Reply Comments at 2.

[414] *See* 47 C.F.R. §§ 76.7 and 76.1003.

[415] 47 C.F.R. § 76.1003(b).

[416] 47 C.F.R. § 76.7(b)(2)(ii); 47 C.F.R. § 76.1003(a).

[417] 47 C.F.R. § 76.7(c)(3); 47 C.F.R. § 76.1003(a).

[418] *See* EchoStar Comments at 25.

[419] *See id*.

[420] *See id*.

access complaints and delegate resolution to the Enforcement Bureau.[421] NCTA opposes a more expeditious pleading cycle because the cycle is already among the shortest time frames in Commission regulation.[422] NCTA argues that reducing the timing of the pleading cycle further would not materially affect the overall time frame for resolving disputes, and would impose additional hardship on respondents.[423]

88. The original program access complaint pleading cycle called for a 30-day response time and 20-day reply window. In the *1998 Program Access Order*, the Commission adopted a more streamlined pleading cycle and reduced those times to 20 and 15 days respectively. The Commission's rules generally require answers to complaints to "advise the parties and the Commission fully and completely of the nature of any and all defenses" and "respond specifically to all material allegations of the complaint" or risk being deemed in default and having the complaint granted.[424] In addition, answers to program access complaints must contain specific information pertinent to the type of complaint, whether it is an exclusivity complaint, a discrimination complaint, or a price discrimination complaint, and must include written documentary evidence.[425]

89. *Discussion*. We find that the existing 20-day response time is necessary to allow sufficient time for a respondent to provide a complete defense. We encourage resolution of program access complaints based on the pleadings.[426] A shorter pleading cycle would not necessarily improve the overall time for complaint resolution because incomplete or rushed responses could lead to the need for further pleadings and discovery. We therefore decline to adopt a more expedited pleading cycle. However, we believe that electronic filing may help improve the speed of resolution and, therefore, we will continue to study this issue internally to determine if it is technologically feasible to require electronic filing for program access complaints, which necessarily involve a number of confidential documents. Currently, parties may voluntarily submit electronic copies of their pleadings to staff via e-mail in order to expedite review.

90. Regarding mandatory weekly status conferences, the Commission currently has the authority to hold status conferences at any time and any party may request that a status conference be held.[427] We believe that this provides the necessary flexibility to conduct status conferences as frequently as needed and decline to modify this rule to require mandatory weekly status conferences. Finally, we decline to shift the burden of complaint resolution to the Enforcement Bureau. We believe that program

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[421] *See* AT&T Comments at 30. As part of the 1996 Act, Congress enacted deadlines for the Commission's resolution of complaints alleging unreasonably discriminatory or otherwise unlawful conduct filed against telecommunications carriers subject to the requirements of the Communications Act. *See* 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), and 275(c); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, Report and Order*, 12 FCC Rcd 22497, 22499-04 (1997) ("*Formal Complaint Order*"). In the *Formal Complaint Order*, the Commission adopted new or amended standards and procedures related to the processing and resolution of formal complaints against common carriers, including pre-filing negotiation requirements, pleading cycles, discovery, status conferences, damages procedures, prima facie claims, and burdens of proof.

[422] *See* NCTA Comments at 9-10.

[423] *See id*. at 9-10.

[424] 47 C.F.R. § 76.7(b)(2).

[425] *See* 47 C.F.R. § 76.1003(e).

[426] *See First Report and Order*, 8 FCC Rcd at 3389-90, ¶ 75.

[427] *See* 47 C.F. R. § 76.8.

access complaints are more appropriately handled by Media Bureau staff with expertise on the issues involved in program access disputes.

2. Discovery

91. In this *Order*, after reviewing our discovery rules pertaining to program access disputes, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; and emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests. The respondent shall have the opportunity to object to any request for documents.[428] Such request shall be heard, and determination made, by the Commission. The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request.

92. Competitive MVPDs urge the Commission to revise the discovery rules applicable to program access complaint proceedings.[429] USTelecom argues for mandatory automatic disclosure of specific information in response to a complaint to ensure adequate factual information is available to resolve the complaint.[430] USTelecom urges the Commission to permit party-directed discovery on a case-by-case case basis and to craft case-specific confidentiality protections for sensitive information.[431] RCN proposes that programmers' carriage contracts be available, subject to confidential treatment, because such agreements are essential for determining whether the programmer is discriminating in price, terms, and conditions.[432] RCN argues that restrictive confidentiality and non-disclosure requirements prevent buyers from knowing whether the rates, terms, and conditions offered are consistent with those provided to affiliated MVPDs and competitors.[433] EchoStar argues for discovery that is simultaneous with the complaint that includes six carriage contracts, both affiliated and unaffiliated, with discovery disputes resolved within ten days.[434] EchoStar also urges the Commission to incorporate the discovery mechanism used in common carrier complaint proceedings.[435]

93. According to CA2C, while the Commission may have been seeking to prevent excessive discovery cost and delay in establishing its current rules, the result has been that key documents are not made available in complaint proceedings, including programming contracts with competitors that are necessary to show *prima facie* discrimination.[436] CA2C and BSPA urge the Commission to make clear that respondents to discrimination complaints must produce these contracts, subject to confidential treatment.[437] These parties also request that the Commission make clear that staff may order discovery, in

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[428] *See infra* ¶¶ 95, 98.

[429] *See* AT&T Comments at 30-32; CA2C Comments at 22-24.

[430] *See* USTelecom Comments at 20.

[431] *See id*.

[432] *See* RCN Comments at 20.

[433] *See id*.

[434] *See* EchoStar Comments at 27.

[435] *See id*. (*citing* 47 C.F.R. § 1.729).

[436] *See* CA2C Comments at 23.

[437] *See id*. (*citing* 47 C.F.R. § 76.9); BSPA Comments at 7.

consultation with or at the request of the parties, in order to facilitate resolution of the case.[438] AT&T asserts that the Commission should apply its procedures for adjudicating formal complaints to program access disputes, including rules governing pleading, discovery, and motions.[439] AT&T asserts that respondents should submit copies of all contracts and documents relevant to the complaint, subject to a codified and standardized protective order.[440] The Consumer Groups also supports additional tools for discovery.[441]

94. Comcast, NCTA, and Time Warner see no need for changes to the discovery rules.[442] NCTA argues that the proposed changes would automatically force programmers to disclose highly confidential and proprietary information and that the Commission considered and rejected similar suggestions in 1998 when it affirmed the use of Commission-controlled discovery.[443] Time Warner asserts that EchoStar's proposal to require a programmer to submit six carriage contracts for comparison with the complainant's contract would allow MVPDs to engage in "fishing expeditions" for highly confidential and competitively sensitive information and would give them substantially increased and unfair leverage in their negotiations with programmers.[444] Time Warner argues that the current rules permit discovery where warranted and that expanded discovery would create a procedural quagmire due to the complex nature of programming contracts.[445] Time Warner asserts that protective orders do not adequately eliminate the potential for harm from disclosure of confidential information.[446]

95. *Discussion*. We take measures to ensure that the Commission has the information necessary to expeditiously resolve program access complaints. In this regard, we take two actions: 1) we codify the requirement that a respondent must attach to its answer all documents that it expressly references or relies upon in defending a program access claim; and 2) we find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

96. *Respondent's Answer.* In the *1998 Program Access Order*, the Commission clarified that, to the extent that a respondent expressly references and relies upon a document or documents in defending a program access claim, the respondent must attach that document or documents to its

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[438] *See* CA2C Comments at 24; BSPA Comments at 7.

[439] *See* AT&T Comments at 30 (*citing* 47 C.F.R. § 1.70, *et seq*.).

[440] *See id.* at 30-32.

[441] *See* Consumer Groups Reply Comments at 8.

[442] *See* Comcast Reply Comments at 36; NCTA Reply Comments at 10, Time Warner Reply Comments at 7.

[443] *See* NCTA Reply Comments at 11.

[444] *See* Time Warner Reply Comments at 3.

[445] *See id*. at 4.

[446] *See id*. at 12.

answer.[447] In this *Order*, we expressly codify that requirement in the Commission's rules.[448] To the extent that there has been any confusion about this requirement in the past, we clarify that a respondent must attach the necessary documentation to its answer to a program access complaint, subject to our rules on confidential filings. Subsequent to the *1998 Program Access Order*, the Commission, in the *1998 Biennial Review*, further clarified the response requirements for specific types of program access complaints.[449] To the extent that a respondent fails to include the permissive attachments identified in our rules that are necessary to a resolution of the complaint, the Commission may require the production of further documents.[450] Moreover, a program access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case.[451] Respondents are also free to request discovery.

97. *Submission of Necessary Information.* We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission,[452] provided that such documents are in its control and relevant to the dispute. In reaching this finding, we agree with the assertions of RCN and other competitors that the availability of programmers' carriage contracts, subject to confidential treatment, are essential for determining whether the programmer is discriminating in price, terms, and conditions. The Commission's rules allow the Commission staff to order production of any documents necessary to the resolution of a program access complaint, including documents upon which a complainant must rely to make its *prima facie* case.[453] The subject discovery may require the production of confidential material, including the disclosure of carriage contracts, subject to our confidentiality rules. While we retain this process for the Commission to order the production of documents and other discovery, we will also allow parties to a program access complaint to serve requests for discovery directly on opposing parties.[454]

98. Parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. As discussed above, the respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.[455]

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[447] *See 1998 Program Access Order*, 13 FCC Rcd at 15849-50, ¶ 56.

[448] *See* Appendix D, § 76.1003(e).

[449] *1998 Biennial Review*, 14 FCC Rcd at 438, Appendix A, ¶ 9 (modifications to § 76.1003); *see* 47 C.F.R. § 76.1003(e).

[450] *See* 47 C.F.R. § 76.1003(e); 47 C.F.R. § 76.7(e)(2).

[451] *See* 47 C.F.R. § 76.7(e), (f).

[452] Indeed, in such circumstances, failure to produce the subject documents would also be a violation of a Commission order.

[453] *See* 47 C.F.R. § 76.7(e), (f).

[454] *See* Appendix D, § 76.1003(j).

[455] *Id*.

99. We reiterate that respondents to program access complaints must produce in a timely manner, the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment.[456] In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached.[457] Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default.[458] Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice.[459] Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.[460]

100. *Confidential Material*. We understand that this approach requires the submission of confidential and extremely competitively-sensitive information.[461] Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to revise the standard protective order and declaration ("Protective Order") for use in program access proceedings.[462] The Protective Order sets out the methodology for producing and protecting pleading or discovery material that is deemed by the submitting party to contain confidential information.[463] The Protective Order states that, once the authorized representative of the reviewing party has signed the appropriate declaration, the submitting party *shall* provide a copy of the confidential information to authorized representatives upon request.[464] Authorized representatives of reviewing parties are limited to counsel and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services; specified persons, including employees of the reviewing parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in the program access proceeding, *other than persons in a position to use the confidential information for competitive commercial or business purposes*; and any person designated

[456] *See* 47 C.F.R. § 76.9.

[457] *See* Appendix D, § 76.1003(j).

[458] *Id.*

[459] *Id*.

[460] *Id*.

[461] *See, e.g.,* 47 C.F.R. § 0.457(d)(iv) (treating as presumptively privileged and confidential "programming contracts between programmers and multichannel video programming distributors"). In this regard, we note that in a recent program access dispute, the Media Bureau expeditiously granted a complainant's request for discovery and issued a protective order to safeguard the highly confidential discovery subject matter. *See EchoStar Satellite L.L.C. v. Home Box Office, Inc*., CSR 7070-P (filed Nov. 15, 2006).

[462] *See 1998 Program Access Order*, 13 FCC Rcd at 15865. The Protective Order is intended to facilitate and expedite review of documents containing privileged or confidential trade secrets and commercial or financial information. *Id*.

[463] *Id.* at 15865-69, ¶ 3. Confidential information is information submitted to the Commission which the submitting party has determined in good faith (i) constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (ii) falls within the terms of Commission orders designating the items for treatment as confidential information. *Id*. at 15865, ¶ 1(c). The Commission may determine that all or part of the information claimed as confidential information is not entitled to such treatment. *See also* 47 C.F.R. § 76.9 (general procedures for protecting confidentiality of information).

[464] *1998 Program Access Order*, 13 FCC Rcd at 15867, ¶ 9.

by the Commission in the public interest, upon such terms as the Commission may deem proper.[465] Confidential information shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with the Protective Order.[466]

101. To ensure that confidential information is not improperly used for competitive business purposes, we intend to make an important revision to the Protective Order. Specifically, we revise it to reflect that any personnel, including in-house counsel, involved in competitive decision-making are prohibited from accessing the confidential information. We more specifically define the limitations on access by including language that the Commission routinely uses in the merger protective orders.[467] The Protective Order currently prohibits access to confidential information by specified persons that are in a position to use the information for competitive commercial or business purposes. We modify the language of the Protective Order to reflect that any counsel, or other persons, including in-house counsel, that are involved in competitive decision-making are prohibited from access to confidential material. We further define competitive decision-making to include any activities, association, or relationship with any person, including the complainant, client, or any authorized representative, that involves rendering advice or participation in *any* or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor.[468]

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[465] *Id.* at 15867, ¶ 7. Before an authorized representative may obtain access to confidential information, he or she must execute a declaration which states that under penalty of perjury he or she has agreed to be bound by the Protective Order. *Id*. at 15866, ¶¶ 5, 6 and at 15870. The declaration states that the reviewing party shall not disclose the confidential information to anyone except in accordance with the terms of the Protective Order and that the confidential information shall be used only for purposes of the program access proceeding. *Id*.

[466] *Id.* at 15867, ¶ 11.

[467] *See, e.g.*, *News Corporation and the DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Protective Order, 2007 WL 1482032 (MB, rel. May 21, 2007).

[468] *Id*. The terminology we insert today concerning activities, associations or relationships that involve rendering advice or participation in business decisions that are or will be "made in light of similar or corresponding information about a competitor" has been standard language used in our merger protective orders. *See Worldcom, Inc. and MCI Communications Corp, Transfer of Control*, 13 FCC Rcd 11166, 11168 (1998). Our definition of "competitive decision-making" as such is consistent with federal court cases. *See, e.g.*, *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (noting that the "competitive decision-making" is a shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions ... made in light of similar or corresponding information about a competitor); *see also Brown Bag Software v. Symantec Corp*. 960 F.2d 1465, 1470 (9th Cir. 1992), *cert. denied* 506 U.S. 869 (1992) (defining "competitive decision-making" as advising on decisions about pricing or design made in light of similar or corresponding information about a competitor). This terminology was more recently discussed in *Intervet, Inc. v. Merial Ltd*., 241 F.R.D. 55 (D.D.C. 2007) as follows: "Thus, U.S. Steel would preclude access to information to anyone who was positioned to advise the client as to business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions. E.g., *Brown Bag Software*, 960 F.2d at 1471 (counsel could not be expected to advise client without disclosing what he knew when he saw competitors' trade secrets as to those very topics); *Matsushita Elec. Indus. Co v. United States*, 929 F.2d 1577, 1579-80 (Fed.Cir. 1991) (determination by agency forbidding access was arbitrary when lawyer precluded from access testified that he was not involved in pricing, technical design, selection of vendors, purchasing and marketing strategies); *Volvo Penta of the Americas, Inc. v. Brunswick Corp*., 187 F.R.D. 240, 242 (E.D.Va. 1999) (competitive decision-making involves decisions "that affect contracts, marketing, employment, pricing, product design" and other decisions made in light of similar or corresponding information about a competitor); *Glaxo Inc. v. Genpharm Pharm., Inc*., 796 F.Supp. 872, 876 (E.D.N.C. 1992) (improper to preclude in-house counsel from access to confidential information because he gave no (continued….)

102. In order to appropriately safeguard confidential information, we revise the Protective Order for use in program access proceedings to find that any personnel, including in-house counsel, (i) that are involved in competitive decision-making, (ii) are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve rendering advice or participation in any or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information.[469]

103. A protective order constitutes both an order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders.[470]

3. Time Frame for Resolving Program Access Complaints

104. In this *Order*, we retain our current goals for resolving program access complaints with the intent to expedite complaints filed by small companies without existing carriage contracts. Under the current process, the Commission has set forth goals for the resolution of program access complaints as five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases.[471] Competitive MVPDs believe that the Commission should establish a firm deadline by which program access complaints must be resolved.[472] OPASTCO/ITTA claim that the current process is so time consuming and costly that rural carriers forgo filing complaints and they urge the Commission to establish procedures that will provide for timely resolution of complaints.[473] ACA and the Consumer Groups also support mandatory time frames for complaint resolution. Verizon urges the Commission to establish a firm deadline of five months by which all complaints should be resolved.[474] USTelecom suggests three months for denial of programming cases and six months for all other complaints.[475] NTCA urges that a firm rather than suggested deadline be established. EchoStar argues for a 45-day "shot clock" deadline with a one-time 45-day extension for complex cases.[476]

105. CA2C advocates a 120-day time frame for all cases, beginning with the close of pleadings.[477] The SBA Office of Advocacy and BSPA support this time frame.[478] CA2C suggests,

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advice to his client about competitive decisions such as pricing, scientific research, sales, or marketing)." *Id*. at 57-58.

[469] *See* Appendix E, Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

[470] *See* Appendix D, § 76.1003(k).

[471] *See 1998 Program Access Order*, 13 FCC Rcd at 15842-43, ¶ 41.

[472] *See* AT&T Comments at 27-29; CA2C Comments at 22; Verizon Comments at 13-14.

[473] *See* OPASTCO/ITTA Comments at 8.

[474] *See* Verizon Comments at 16.

[475] *See* USTelecom Comments at 21.

[476] *See* EchoStar Comments at 25.

[477] *See* CA2C Comments at 22. We note that CA2C's 120-day time limit beginning at the end of the pleading cycle is no shorter than the Commission's current time frame for resolving routine program access complaints.

however, that the time limit be suspended to facilitate settlement negotiations.[479] CA2C asserts that, rather than complaints being resolved in the five- to nine-month time frame envisioned in the *1998 Program Access Order,* complaints often take years to resolve, which has a disparate impact on new entrants, through prolonged delays in a competitor's ability to carry must have programming pending resolution of denial of carriage complaints.[480] CA2C also asserts that the existing time frames have a negative impact on existing competitive providers, by imposing the continued payment of discriminatory prices over a prolonged period of time in price discrimination cases, and forcing competitors to divert inordinate resources to prosecution of program access complaints.[481]

106. AT&T asserts that delays in processing a complaint can cripple the ability of a new entrant to attract new subscribers and tarnish public perception of a new entrant's video offering during a critical period when consumers are forming initial impressions of that offering.[482] AT&T argues that the Commission should adopt a 90-day binding deadline for complaint resolution, consistent with the 90-day deadline for Section 271 complaints.[483] NCTA states that it does not oppose a more expedited time frame for Commission resolution of complaints, so long as cable operators and programmers are provided with sufficient time to respond to complaints.[484] Comcast does not object to the Commission firming up its deadlines for action on complaints.[485]

107. *Discussion*. We agree that program access complaints should be resolved in a timely manner, but the time frames for resolving complaints must be realistic. We will retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases. In the *1998 Program Access Order*, in imposing goals for the resolution of complaints, the Commission attempted to ascertain what can be accomplished on a consistent basis. The Commission found that a single time limit would require the Commission to adopt a longer time limit than would be necessary in many cases.[486] Consistent with the Commission's other statutory deadlines, the Commission adopted time frames that commenced from the time of the filing of a complaint. The Commission's designation of a five-month limit was consistent with the five-month period in which Congress required the Commission to resolve certain complaints against common carriers.[487] Other program access complaints, including price discrimination cases, were given a nine-month time frame for resolution, excluding the time necessary to resolve bifurcated damages issues.[488] The Commission determined that these were realistic goals, achievable given the Commission's limited resources and

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[478] *See* BSPA Comments at 19; SBA Office of Advocacy Comments at 8.

[479] *See* CA2C Comments at 22.

[480] *See id*. at 21. CA2C offers no specific examples to establish that program access complaints often take years to resolve since adoption of the *1998 Program Access Order* time frames.

[481] *See id*. at 21.

[482] *See* AT&T Comments at 28.

[483] *See id.* at 29 (citing 47 U.S.C. § 271).

[484] *See* NCTA Comments at 14.

[485] *See* Comcast Reply Comments at 4.

[486] *See 1998 Program Access Order*, 13 FCC Rcd at 15842, ¶ 39.

[487] *See id*. at 15842, ¶ 41, n.121 (citing 47 U.S.C. §208(b)(1)); *see also Formal Complaint Order*, 12 FCC Rcd at 22499, n.4.

[488] *See 1998 Program Access Order*, 13 FCC Rcd at 15842, ¶ 41.

overall statutory duties. The Commission also provided for the suspension of the time limits upon motion by parties seeking to pursue settlement negotiations.[489]

108. We find that these time limits for resolution are still reasonable. We fail to see a direct correlation between a more expedited process for the resolution of program access complaints and lower litigation costs to complainants. Indeed, we believe that overly accelerated pleading and discovery time periods can lead to increased litigation costs if the parties are required to hire additional staff and counsel in attempting to meet unrealistic deadlines. However, we are concerned with delays in the resolution of complaints filed by new entrants, especially small businesses, and therefore, the Commission will expedite the resolution of such complaints and, as discussed above in Section III.B.2, will strictly enforce its default rules against respondents who do not answer complaints thoroughly with the necessary documentation attached.[490]

4. Arbitration

109. In this *Order*, we expand the use of voluntary arbitration for resolution of program access disputes, by increasing opportunities for parties to choose arbitration in lieu of Commission resolution of a pending complaint, and refrain from imposing a mandatory arbitration requirement at this time. Competitive MVPDs urge the Commission to implement arbitration measures into the program access complaint process. NTCA, OPASTCO/ITTA, and SureWest, as well as the SBA Office of Advocacy, all support some form of arbitration.[491] ACA, BSPA, EchoStar, and RCN, as well as Consumer Groups, all urge the adoption of "baseball-style" commercial arbitration rules, similar to those approved in connection with two recent mergers ("*Adelphia and Hughes Orders*").[492] BSPA believes that the arbitration rules adopted in the two merger cases are a good template for arbitration rules that the Commission should adopt as part of its program access rules. BSPA and RCN point out that the ultimate goal of establishing an arbitration option is to push the parties toward agreement prior to a complete breakdown in negotiations.[493] RCN points out that the rationale for adopting an arbitration remedy in the *Adelphia* and *Hughes* proceedings applies equally in this context because vertically integrated programmers have similar incentives to use temporary foreclosures during negotiations.[494] BSPA argues that there is precedent for the use of third parties to adjudicate disputes under the Communications Act.[495] EchoStar asserts that arbitration of program access complaints is consistent with all statutory

[489] *See id*. at 15843, ¶ 42.

[490] *See* 47 C.F.R. § 76.7(b)(2)(iii).

[491] *See* NTCA Comments at 6; OPASTCO/ITTA Comments at 8; SBA Office of Advocacy Comments at 8; SureWest Comments at 10.

[492] *See* BSPA Comments at 7 (*citing Adelphia Order; Hughes Order*); ACA Comments at 10 (same); EchoStar Comments at 18 (same); RCN Comments at 19 (same); Consumer Groups Reply Comments at 7 (same).

[493] *See* BSPA Comments at 8; RCN Comments at 19.

[494] *See* RCN Comments at 19.

[495] *See* BSPA Comments at 12-14 (citing *Improving Public Safety Communications in the 800 MHz Band, et al*., 19 FCC Rcd 14969, 15070-71, 15074-75 and n.509 (2004); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 5037 (1994); *Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (1996)).

requirements, including the 1992 Cable Act, the Administrative Procedure Act,[496] and the Administrative Dispute Resolution Act of 1996,[497] as well as with the subdelegation doctrine.[498]

110. Comcast states that the Commission should not require arbitration of disputes.[499] Comcast asserts that Section 628 assigns the responsibility to adjudicate disputes to the Commission and there is no provision of law that authorizes the Commission to mandate binding arbitration.[500] NCTA asserts that mandatory arbitration would improperly delegate the Commission's responsibilities to an outside party or, if the Commission provides for *de novo* review of the arbitrator's decision, would add an extra, time-consuming layer to what is now an expeditious process.[501] NCTA states that establishing a mandatory commercial arbitration provision similar to those imposed in the *Adelphia* and *Hughes* proceedings would be neither lawful nor advisable.[502] NCTA points out that the Commission already has procedures in place that allow parties to agree to invoke alternative dispute resolution ("ADR") to resolve certain factual disputes in lieu of referral to an administrative law judge, consistent with the Commission's ADR policy which relies on ADR as a "purely voluntary" measure.[503] NCTA continues that Section 628 provides the Commission with no authority to adopt one-sided arbitration rules and a party cannot be involuntarily subjected to arbitration of these complaints.[504]

111. The Broadcast Networks urge the Commission to refrain from imposing binding arbitration as a catch-all solution, contending there is no problem in need of solution, the Commission already has sufficient and effective remedies in place to resolve program access disputes, and the overlay of an additional layer of process would serve to prolong the Commission's deliberative process.[505] Moreover, the Broadcast Networks argue that the Commission has no authority to delegate its statutory obligation to resolve program access complaints.[506] Time Warner urges the Commission to reject mandatory arbitration of program access complaints.[507] Time Warner argues that because arbitration is generally a matter of contract, and federal law prohibits an agency from requiring consent to arbitration in

[496] 5 U.S.C. § 551 *et seq*.

[497] *Id*. §§ 571-584.

[498] *See* EchoStar Comments at 20. Under subdelegation principles, agencies may refer matters outside the agency for fact-finding and the issuance of preliminary decisions, provided the decisions remain subject to final agency review. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (DC Cir. 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). Providing for *de novo* review by the Commission of arbitration awards satisfies this requirement. *See National Park & Conservation Association v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999) (rejecting as unlawful a procedure by which the agency "completely shift[ed] its responsibility" to an outside council and "retain[ed] virtually no final authority over the action -- or inaction -- of the Council").

[499] *See* Comcast Comments at 28.

[500] *See id*.

[501] NCTA Comments at 12-14.

[502] *Id*. at 11.

[503] *See* NCTA Reply Comments at 12 (*citing* Comcast Comments at 29); *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669, 5670, ¶ 12 (1991).

[504] *See* NCTA Reply Comments at 13.

[505] *See* Broadcast Networks Reply Comments at 3-4.

[506] *See id*. at 4.

[507] *See* Time Warner Reply Comments at 4.

order to ensure that it is truly voluntary, a mandatory arbitration requirement would be *ultra vires* and unlawful.[508]

112. *Discussion*. We decline to impose mandatory arbitration as a rule in all program access cases at this time. We would like to see how arbitration of program access disputes, either through a merger condition or through voluntary arbitration, is working over time, to determine if modifications to the arbitration process are necessary prior to imposing a mandatory requirement on all parties to all program access complaints. Once there is a track record for arbitration of program access disputes, we will be able to determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance.

113. The current rules allow parties to voluntarily engage in ADR, including arbitration, in lieu of an administrative hearing.[509] However, we believe that parties to program access complaints should be able to voluntarily choose arbitration prior to the Commission making a determination to forward the complaint to an administrative law judge and that the *Adelphia Order* provide adequate guidance for the arbitration process.[510] Therefore, the Commission will suspend action on a complaint where both parties agree to use ADR, including commercial arbitration, within 20 days following the close of the pleading cycle. Parties may agree that voluntary arbitration is a quick and productive way to resolve their commercial disputes. Moreover, we will continue to monitor developments in the marketplace and will, if necessary, revisit in the future whether to adopt a mandatory arbitration requirement.

IV. NOTICE OF PROPOSED RULEMAKING

A. Procedure for Shortening Term of Extension of Exclusive Contract Prohibition

114. In light of the five-year extension of the exclusivity ban, the Commission seeks comment on whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e*., October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. We seek comment on what this penetration level should be. And, we seek comment on whether two years or some other time frame is the appropriate period of time. Finally, we ask parties to comment on whether a market-by-market analysis is appropriate as both a legal and policy matter.

B. Extending Program Access Rules to Terrestrially Delivered Cable-Affiliated Programming

115. In comments on the *NPRM*, competitive MVPDs provided various examples of withholding of terrestrially delivered cable-affiliated programming.[511] Moreover, in the *Order*, we note the Commission's previous findings that in two instances – Philadelphia and San Diego – withholding of terrestrially delivered cable-affiliated programming has had a material adverse impact on competition in

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[508] *See id*.

[509] *See* 47 C.F.R. § 76.7(g)(2). Section 572(a) of the Administrative Dispute Resolution Act ("ADRA") provides that "[a]n agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). Section 575(a)(1) authorizes the use of arbitration as an alternative means of dispute resolution "whenever all parties consent." 5 U.S.C. § 575(a)(1).

[510] *See Adelphia Order*, 21 FCC Rcd at 8836, Appendix B, and 8340, Appendix C.

[511] *See supra* ¶ 49.

the video distribution market.[512] As discussed in the *Order*, however, the Commission has previously concluded that terrestrially delivered programming is "outside of the direct coverage" of the exclusive contract prohibition in Section 628(c)(2)(D).[513] In the *Order*, we state our continued view that the plain language of the definitions of "satellite cable programming" and "satellite broadcast programming" as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).[514] Commenters, however, cite various other provisions of the Communications Act as providing the Commission with statutory authority to extend the program access rules, including an exclusive contract prohibition, to terrestrially delivered cable-affiliated programming, such as Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706.[515]

116. As demonstrated by the examples of withholding of RSNs in San Diego and Philadelphia, we believe that withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market. To address this concern, we seek comment on whether it would be appropriate to extend our program access rules to all terrestrially delivered cable-affiliated programming pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.[516] In particular, we note our previous conclusion that the ability to offer a viable video service is "linked intrinsically" to broadband

[512] *See id*.

[513] *See supra* ¶ 78.

[514] *See id.*

[515] *See* SureWest Comments at 7-8 (citing Section 4(i) of the Communications Act); Verizon Comments at 14 (same); *id*. at 14 (citing Section 303(r) of the Communications Act); SureWest Comments at 8 (citing Section 601(6) of the Communications Act); RICA Comments at 5 (citing Section 612(g) of the Communications Act); *id*. at 5 (citing Section 616(a) of the Communications Act); SureWest Comments at 7 (citing Section 628(b) of the Communications Act); *see also* AT&T Comments at 9 n.24; BSPA Comments at 16-18; EchoStar Comments at 4.

[516] *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); 47 U.S.C. § 303(r) ("The Commission from time to time, as public convenience, interest, or necessity requires, shall . . . (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ."); 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI (Cable Communications) of the Communications Act is to "promote competition in cable communications . . . ."); 47 U.S.C. § 532(g) (stating that when "cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources"); 47 U.S.C. § 536(a) (stating that the "Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors"); 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."); 47 U.S.C. § 157 nt. (stating that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment").

deployment.[517] We seek comment on whether the ability to offer terrestrially delivered cable-affiliated programming is needed to offer a viable video service and, accordingly, whether extending the program access rules, including the prohibition on exclusive contracts, to terrestrially delivered cable-affiliated programming would promote the goal of Section 706 to facilitate broadband deployment. In addition, we note that the plain language of Section 628(b), like Section 628(c)(2)(D), specifies "satellite cable programming" and "satellite broadcast programming."[518] We seek comment regarding whether we have the authority to extend our program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in Section 628 that limits their scope to satellite programming.

117. We also seek comment on the extent to which cable operators are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules. We note Verizon's claim that Cablevision's programming subsidiary, Rainbow, has made standard definition feeds of its RSNs available by satellite, but HD feeds available terrestrially, thereby avoiding the program access rules, including the exclusive contract prohibition, for HD feeds.[519] We seek comment on whether the program access rules should apply to all feeds of the same programming, including both standard and HD feeds, regardless of whether one feed is delivered terrestrially. We also seek comment on whether shifting the HD feed of vertically integrated cable programming to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of Section 628(b) of the Communications Act.[520]

C. Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming

118. We also seek comment on whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. As discussed above, to the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming.[521] Moreover, as noted above, Section 628(j) of the Communications Act provides that any provision of Section 628, including the exclusive contract prohibition in Section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming.[522] Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). We seek comment on

[517] *See Local Franchising Report and Order*, 22 FCC Rcd at 5132-33, ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted).

[518] *See* 47 U.S.C. §§ 548(b); 548(c)(2)(D).

[519] *See* Verizon Comments at 13-14; Verizon Reply Comments at 5.

[520] 47 U.S.C.§ 548(b). The Commission has stated "there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming." *See RCN Telecom Services v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12053, ¶ 15; *DIRECTV*, 15 FCC Rcd at 22807; *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* 11 FCC Rcd 18223, 18325, ¶ 197 n.451 (1996) ("we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs").

[521] *See supra* ¶ 76.

[522] *See supra* note 377; *see also* 47 U.S.C. § 548(j).

whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.[523]

D. Tying of Desired Programming with Undesired Programming

119. Small and rural cable operators and other MVPDs have raised concerns regarding tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast network.[524] For example, in 2002, the American Cable Association ("ACA"), representing small cable operators, filed a Petition for Inquiry stating that broadcast networks and station groups engage in unfair retransmission tying arrangements.[525] ACA explains that tying harms small cable operators and their consumers by increasing the costs of basic cable and reducing program choices.[526] Small and rural cable operators and other MVPDs, in addition to recent program access complainants, have also raised concerns regarding the practice of programmers to tie marquee programming, such as premium channels or regional sports programming, with unwanted, or less desirable, programming.[527] For example, in their comments on the *Notice*, OPASTCO/ITAA, representing small and rural MVPDs, cites the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry into the MVPD market.[528]

120. When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer.[529] In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network. Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.[530] As discussed in more detail below,

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[523] *See supra* n. 516.

[524] *See supra* ¶ 82.

[525] American Cable Association's Petition for Inquiry into Retransmission Consent Practices (filed October 1, 2002) ("*ACA 2002 Petition*").

[526] *See id*. at 2, 18.

[527] *EchoStar Satellite L.L.C. v. Home Box Office, Inc.,* CSR 7070-P, filed November 15, 2006, dismissed at the request of the parties on February 5, 2007, DA 07-2661.

[528] *See* OPASTCO/ITTA Comments at 5-8.

[529] *See ACA 2002 Petition* at 2 ("Due to limited capacity of smaller cable systems, tying arrangements restrict the ability of those systems to carry additional services.").

[530] *See* NTCA Comments at 8.

we seek comment on these various types of tying arrangements. Given the problems associated with such tying arrangements, we seek comment on whether it may be appropriate for the Commission to preclude them. We also seek comment on the extent to which these disparities in bargaining power are the result of media consolidation, and, if so, what steps the Commission can and should take to redress the imbalance.

121. *Tying of Broadcast Programming*. We seek comment on the tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks. Section 325(b)(3)(C) of the Communications Act obligates broadcasters and multichannel video programming distributors to negotiate retransmission consent agreements in good faith.[531] Specifically, the Commission must establish regulations that:

> until January 1, 2010, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[532]

122. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.[533] The *Good Faith Order* adopted a two-part test for good faith.[534] The first part of the test consists of a brief, objective list of negotiations standards.[535] The second part of the good faith test is based on a totality of the circumstances standard.[536]

[531] 47 U.S.C. § 325(b)(3)(C).

[532] 47 U.S.C. § 325(b)(3)(C)(ii). Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Congress extended 47 U.S.C. § 325(b)(3)(C) until 2010 and amended that section to impose a reciprocal good faith retransmission consent bargaining obligation on MVPDs. The Commission adopted rules implementing Section 207 of SHVERA. *See In the Matter of: Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339 (2005). ("*Reciprocal Bargaining Order*").

[533] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

[534] *Good Faith Order*, 15 FCC Rcd at 5457.

[535] *Id.* at 5462-64. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. *Id.*; *see* 47 C.F.R. § 76.65(b)(1)(i)-(vii).

[536] *Good Faith Order*, 15 FCC Rcd at 5458; 47 C.F.R. § 76.65(b)(2).

123. The Commission has held that "[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal" is a *per se* violation of a broadcast licensee's good faith obligation.[537] The Commission has also indicated that such requirement is not limited to monetary considerations, but also applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent:

> "Take it, or leave it" bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming. This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal. This standard only requires that the broadcaster be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.[538]

124. As discussed above, ACA in 2002 filed a Petition for Inquiry regarding the Commission's retransmission consent rules.[539] ACA's Petition raises concerns about broadcasters' alleged abuse of the retransmission consent process.[540] ACA asserts that broadcast networks and station groups engage in unfair retransmission tying arrangements. ACA asserts that small cable operators have minimal bargaining power during negotiations and are targets for abuse because of their lack of resources to file complaints and engage in disputes.

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[537] 47 C.F.R. § 76.65(b)(1)(iv).

[538] *Good Faith Order*, 15 FCC Rcd at 5463, ¶ 43.

[539] American Cable Association's Petition for Inquiry into Retransmission Consent Practices (filed October 1, 2002). This petition will be placed in the record of this proceeding. ACA also filed a "Petition for Rulemaking to Amend 47 CFR §§ 76.64,76.93 and 76.103" on March 2, 2005, which asserted that competition and consumers are harmed when broadcasters use exclusivity and network affiliate agreements to extract "supracomepetitive prices" for retransmission consent from small cable companies. *See Public Notice*, Report No. 2696, RM-11203 (March 17, 2005).

[540] We note that that in its *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (September 8, 2005) (available at http://www.fcc.gov/mb/policy/shvera.html), the Commission addressed the tying issue. The Commission noted "cable operators' widespread concern that retransmission consent negotiations frequently involve broadcasters tying carriage of their signals to numerous affiliated non-broadcast programming networks." *Id.* at 25. The Report noted that "since the Commission's decision to deny broadcasters the ability to assert dual and multicast must carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for digital signals, including all free over-the-air digital multicast streams. Should Congress consider proposals circumscribing retransmission consent compensation, we encouraged review of related rules and policies to maintain proper balance." *Id.*

125. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether broadcasters are tying carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks and, if so, how retransmission consent negotiations are impacted. We ask if broadcast networks and station groups engage in retransmission consent tying arrangements that result in harm to small cable operators and their customers. We ask if the Commission's good faith negotiation regulations provide enough protection for small cable operators and small broadcasters in the negotiation process, taking into account the administrative burdens and costs of engaging in a contested case before the Commission. We seek comment on whether and how the Commission's good faith negotiation regulations should be modified to address these concerns. Also, we ask what the effect of any modifications would be on the economic underpinnings of broadcast-affiliated programmers.

126. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by broadcasters, without modification of the retransmission consent regime by Congress. The legislative history of Section 325 addresses the right of broadcasters to seek carriage of additional channels as part of retransmission consent transactions: "Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[541] Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations.

127. In addition, we seek comment regarding whether there are grounds for the Commission to depart from prior holdings that permitted broadcasters to negotiate the carriage of affiliated channels as part of retransmission consent negotiations. The Commission has stated that examples of bargaining proposals "presumptively… consistent with competitive marketplace considerations and the good faith negotiation requirement" include "proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market."[542] We held that such a proposal contains "presumptively legitimate terms and conditions or forms of consideration" and found nothing to suggest that such a request is "impermissible" or anything "other than a competitive marketplace consideration."[543] In 2001, the Commission considered but refused to adopt rules specifically prohibiting tying arrangements.[544] The Commission concluded that such arrangements are permitted, but stated it would continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters. We seek comment on whether market circumstances and industry practices have changed to warrant a different conclusion.

128. Lastly, we ask whether Commission action to preclude tying arrangements is consistent with the First Amendment. On the one hand, it could be argued that restricting such arrangements infringes the right of broadcasters to express a message by packaging together certain content. On the other hand, we note that the Supreme Court has observed that "the programming offered on various

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[541] S.Rep. No. 102-92, at 35-36 (1991), accompanying S.12, 102nd Cong. (1991).

[542] *Implementation of the Satellite Home View Improvement Act of 1999; Retransmission Consent Issues, Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 (2000).

[543] *Id.*

[544] *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home View Improvement Act of 1999*, 16 FCC Rcd 2598, 2613 (2001).

channels" by video distributors consists of "individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."[545] Unlike newspapers and magazines, the Court suggested that these segments do not "contribute something to a common theme" expressed by the distributor to its subscribers.[546]

129. *Tying of Satellite Cable Programming*. Small and rural MVPDs as well as program access complainants have asserted that tying practices by satellite cable programmers constitute "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming…to subscribers or consumers" in violation of Section 628(b) of the Communications Act.[547] At the time of the *First Report and Order*, the Commission declined to adopt specific rules under Section 628(b) to address tying, while clearly reserving the right to do so if necessary:

> Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified "unfair practices" prohibited by Section 628(b)…. The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.
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> Thus, although the types of conduct more specifically referenced in the statute, *i.e.*, exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to broader distribution of satellite cable…programming.[548]

130. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether satellite cable programmers are tying carriage of their desirable channels to carriage of other less desirable owned or affiliated channels. We ask whether and how such tying arrangements affect small cable operators and their customers. We seek comment on whether "take-it-or-leave-it" tying arrangements (*i.e.*, where the purchase of desired programming is conditioned on the purchase of undesired programming) without any alternative offer to provide the programming on a stand-alone basis are prevalent in the industry; and if so, whether such an arrangement is a violation of Section 628(b). As discussed above, in such situations, MVPDs are victims of an unfair method of competition that hinders significantly or prevents MVPDs from providing satellite cable programming to subscribers.

131. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by satellite cable programmers under Section 628(b) or any other statutory authority. We

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[545] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 576 (1995).

[546] *Id*.

[547] 47 U.S.C.§ 548(b).

[548] *First Report and Order*, 8 FCC Rcd at 3373.

seek comment on whether Section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Moreover, to the extent that we decide in this proceeding to extend the Commission's program access rules to terrestrially delivered cable-affiliated programming networks, we seek comment on whether we should also require terrestrially delivered cable-affiliated programming networks to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Lastly, we ask whether Commission action to preclude tying arrangements by satellite cable programmers is consistent with the First Amendment.

132. *Tying of Other Programming*. We also seek comment on whether we have the jurisdiction or authority to require networks that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network, to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. We seek comment on the extent to which such programming networks have engaged in unfair tying practices or other abusive practices that would require regulatory intervention. We seek comment on whether it would be appropriate to regulate these programming networks in such a manner pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), and 706, or any other provision under the Communications Act.

E. Program Access Concerns Raised by Small and Rural MVPDs

133. As discussed above, small and rural MVPDs raise additional issues in their comments regarding obstacles they face in trying to obtain access to programming.[549] They ask the Commission to examine various conditions they describe as onerous and unreasonable, which they allege are imposed by programmers on small and rural MVPDs for access to content, including restrictions on the use of shared headends for receiving content.[550] NTCA and OPASTCO/ITTA claim that use of a shared headend is an economical means for multiple rural MVPDs to provide video service in a high-cost area, but that programmers have expressed concern with the potential for the use of shared headends to result in unauthorized reception of programming.[551] NTCA states that while shared headend providers are currently negotiating with content providers to resolve these issues, it is concerned that rural consumers served by shared headends may lose access to programming if these negotiations fail.[552] In addition to the issue of shared headends, small and rural MVPDs ask the Commission to examine other conditions imposed by programmers, including (i) requiring MVPDs to enter into mandatory non-disclosure agreements with programmers, which prevents small and rural MVPDs from obtaining information about

[549] *See* NTCA Comments at 6-8; OPASTCO/ITTA Comments at 5-8.

[550] *See* NTCA Comments at 6-7; OPASTCO/ITTA Comments at 8.

[551] *See* NTCA Comments at 7 ("Some small video providers serve less than 300 residents within their service areas. If many small rural video providers were required to invest approximately $1 to $3 million in a head-end, manage and maintain the network and absorb the programming costs, they could never expect to recover their investment nor provide affordable/competitive video services throughout their service areas.").

[552] *See id*. at 7; OPASTCO/ITTA at 8 (asking the Commission to establish that the use of shared headends may not serve as an excuse for programmers to impose inordinately high rates or unwarranted encryption restrictions beyond those necessary for a reasonable degree of protection). In response to these concerns, NCTA and Comcast argue that the issue of restrictions on the use of shared headends is not within the Commission's authority under Section 628 and that the use of shared headends raises a security issue that is relevant to all programming networks, regardless of whether the programming network is affiliated with a cable operator. *See* NCTA Reply Comments at 14-15; Comcast Reply Comments at 31-32.

the market value of programming;[553] (ii) requiring small and rural MVPDs to provide programmers with "hundreds of advertising slots";[554] and (iii) mandating unwarranted security requirements that extend beyond the legitimate need to protect programming.[555] OPASTCO/ITTA claim that all of these conditions impede the entry of small and rural telephone companies into the video distribution marketplace. We seek comment on the extent to which such practices are occurring in the marketplace and, if so, whether we should, and whether we have the authority to, take action to address these practices.

F. Modification of Program Access Complaint Procedures

134. *Remedies for Violations*. We seek comment on whether to add an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. We agree with commenters that commercial arbitration requires parties to put forth their best effort to resolve disputes or risk the arbitrator adopting the opposing parties' proposals.[556] This type of pressure can encourage the parties to resolve their differences through settlement. We believe that a modified version of this method can encourage negotiation among the parties. Therefore, we seek comment on whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best "final offer" proposal for the rates, terms, or conditions under review. We seek comment on whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint.

135. *Status of Existing Contract Pending Resolution of Program Access Complaint.* While we decline to adopt mandatory arbitration in lieu of the Commission's complaint process in the *Order*, we issue this *NPRM* on the issue of a provision for complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. Some competitive providers recommend a "standstill" requirement for pre-existing carriage contracts during adjudication of program access disputes, to preserve the *status quo* until the program access complaint has been resolved.[557] In a recent merger transaction, in adopting conditions for arbitration of program access disputes, the Commission required that an aggrieved MVPD have continued access to the programming in question under the terms and conditions of the expired contract, pending resolution of the dispute.[558] Verizon supports a five-month long standstill provision while complaints are being resolved. BSPA, RCN, and USTelecom support a standstill provision pending the resolution of the complaint, wherein carriage is continued and the parties are subject to the same price, terms, and conditions of the existing contract, with any new price

[553] *See* OPASTCO/ITTA Comments at 6; *see also* Comments of OPASTCO, MB Docket No. 06-189 (December 29, 2006), at 12.

[554] *See* OPASTCO/ITTA Comments at 6.

[555] *See id*.

[556] *See* Echostar Comments at n. 36; BSPA Comments at n. 16 (*citing Hughes Order*, 19 FCC Rcd 473, 552, ¶ 174 and n.490, which concluded that final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator" (*citing* Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264)).

[557] *See* BSPA Comment at 7; Verizon Comments at 16-17; BSPA Reply Comments at 15.

[558] *See Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § B(2)(c). Provision of the disputed programming during the pendency of arbitration was not required in the case of the first time requests for programming where no carriage agreement had previously existed between the parties. *See id*., Appendix B, § B(2)(d).

arising out of resolution to be applied retroactively to the date of the complaint.[559] BSPA asserts that vertically integrated programmers covered by the program access rules have incentives to use temporary foreclosure strategies during negotiations for programming and, therefore, standstill agreements should be made part of the program access complaint procedures.[560] Other parties favoring a standstill provision include ACA, EchoStar, and SureWest.[561] EchoStar asserts that there can be no doubt that the Commission has the authority to promulgate a standstill requirement as a lesser interim remedy where interruption of carriage threatens to cause irreparable injury to the public.[562]

136. NCTA opposes any "standstill" provision and states that there is no authority that allows the Commission to interfere in the right to contract in this way.[563] Time Warner asserts that the standstill requirement would prohibit a network from de-authorizing carriage by an MVPD, but would allow the MVPD to drop the network, creating an unfair bargaining situation.[564] Time Warner believes that any standstill requirement would increase the likelihood of program access complaints because the MVPD will have a strong incentive to file a complaint just to protect the *status quo* and decrease the chances that parties will resolve their disputes because the incentive of either party to negotiate could be reduced once the *status quo* is protected.[565] Comcast and the Broadcast Networks also oppose any "standstill" requirement.[566]

137. We agree that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints.[567] We request comment on whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. We request comment on whether complainants must formally request such relief from the Commission and must establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay.[568] We request comment on whether, as part of a showing of irreparable harm,

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[559] *See* BSPA Comments at 14-15; RCN Comments at 19-20; USTelecom Comments at 27.

[560] *See* BSPA Comments at 15.

[561] *See* ACA Comments at 8; EchoStar Comments at 30; SureWest Comments at 10.

[562] *See* ACA Comments at 8; EchoStar Comments at 30; SureWest Comments at 10.

[563] *See* NCTA Reply Comments at 14.

[564] *See* Time Warner Reply Comments at 19.

[565] *See id*.

[566] *See* Broadcast Networks Reply Comments at 3; Comcast Reply Comments at 38.

[567] In the *Adelphia Order*, the Commission discussed circumstances wherein temporary foreclosure of programming service may be profitable even where permanent foreclosure is not. *See Adelphia Order*, 21 FCC Rcd at 8257-58, ¶ 121. By temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. *See id*. The Commission included, as a measure to alleviate such foreclosure strategies, a requirement that, upon receiving timely notice of an MVPD's intent to arbitrate, program carriage be continued under the existing terms and conditions. *See id.* at Appendix B, § B(2)(c); *see also Hughes Order*, 19 FCC Rcd at 544-48, ¶¶ 153-162 and 633, Appendix D.

[568] *See, e.g.*, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Hispanic Information and Telecomm. Network, Inc*., 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. We request comment on whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. We request comment on the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. We request comment on whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. We request comment on whether the length of the stay should be entirely discretionary. Finally, we request comment on whether the Commission should include, as part of its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

V. PROCEDURAL MATTERS

A. Filing Requirements

138. *Ex Parte Rules*. The *Notice of Proposed Rulemaking* in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[569] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[570] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

139. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[571]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov,

[569] *See* 47 C.F.R. § 1.1206(b), as revised.

[570] *See id.* § 1.1206(b)(2).

[571] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

140. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

141. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at http://www.bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

142. *Information*. For additional information on this proceeding, contact Steven Broeckaert, Steven.Broeckaert@fcc.gov; David Konczal, David.Konczal@fcc.gov; or Katie Costello, Katie.Costello@fcc.gov; of the Media Bureau, Policy Division, (202) 418-2120.

B. Initial and Final Regulatory Flexibility Analysis

143. *Initial Regulatory Flexibility Analysis ("IRFA")*. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[572] requires that a regulatory flexibility analysis be prepared for notice and

[572] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[573] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[574] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[575] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[576] As required by the RFA,[577] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *NPRM*. The IRFA is set forth in Appendix F.

144. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,[578] the Commission has prepared an FRFA relating to the *Report and Order*. The FRFA is set forth in Appendix G.

C. Paperwork Reduction Act Analysis

145. *Initial Paperwork Reduction Act Analysis*. The *NPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[579] and contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.

146. Written comments on the PRA proposed information collection requirements must be submitted by the public, the OMB, and other interested parties on or before 60 days after publication in the *Federal Register*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[580] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

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[573] 5 U.S.C. § 605(b).

[574] *Id*. § 601(6).

[575] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id*. § 601(3).

[576] 15 U.S.C. § 632.

[577] *See* 5 U.S.C. § 603.

[578] *See* 5 U.S.C. § 604.

[579] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[580] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

147. In addition to filing comments with the Office of the Secretary, a copy of any comments on the proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St, S.W., Room 1-C823, Washington, D.C., 20554, or via the Internet at PRA@fcc.gov; and also to Jasmeet Seehra, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via Internet to Jasmeet_K._Seehra@omb.eop.gov, or via fax at 202-395-5167.

148. *Further Information.* For additional information concerning the PRA proposed information collection requirements contained in this *NPRM*, contact Cathy Williams at 202-418-2918, or via the Internet at PRA@fcc.gov.

149. *Final Paperwork Reduction Act Analysis*. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

150. We have assessed the effects of the new information collection requirements, and find that those requirements will benefit companies with fewer than 25 employees by facilitating the resolution of program access complaints and that these requirements will not burden those companies.

D. Congressional Review Act

151. *Congressional Review Act*. The Commission will send a copy of this *Report and Order and Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

152. Accordingly, **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, this *Report and Order and Notice of Proposed Rulemaking* **IS ADOPTED**.

153. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix D.

154. **IT IS FURTHER ORDERED** that (i) pursuant to 5 U.S.C. § 553(d)(3) and 47 C.F.R. § 1.427(b), the amendment to Section 76.1002(c)(6) and new Sections 76.1003(i) and 76.1003(k) **WILL BECOME EFFECTIVE** upon publication in the *Federal Register*;[581] and (ii) the amendment to Section

[581] *See* 5 U.S.C. § 553(d)(3) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except ... as otherwise provided by the agency for good cause found and published with the rule."); *see also* 47 C.F.R. §§ 1.103(a), 1.427(b).

Section 76.1002(c)(6) provides that the exclusive contract prohibition set forth in Section 76.1002(c)(2) will expire on October 5, 2007. *See* 47 C.F.R. § 76.1002(c)(6). Accordingly, it is necessary for the five-year extension of this prohibition reflected in the amendment to Section 76.1002(c)(6) adopted herein to take effect by October 5, 2007. We thus find good cause to make the amendment to Section 76.1002(c)(6) effective upon publication in the *Federal Register.* We note further that this amendment extends an existing requirement and does not impose any new (continued….)

76.1003(e)(1) and new Section 76.1003(j) contain information collection requirements subject to the PRA and **WILL BECOME EFFECTIVE** upon approval by the Office of Management and Budget.[582]

155. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Notice of Proposed Rulemaking* including the Initial and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

156. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order and Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)
requirements on any entity. Accordingly, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*.

We also find good cause to make the amendments to our procedural rules adopted herein, other than those that require OMB approval, effective upon publication in the *Federal Register*. These rules are (i) new Section 76.1003(i), which allows parties to a program access dispute to voluntarily engage in ADR; and (ii) new Section 76.1003(k), which pertains to the Commission's authority to issue protective orders regarding confidential material submitted in program access complaint proceedings and to issue appropriate sanctions for violations of its protective orders. These new rules are essential to our goal of expeditiously resolving program access complaints. We find good cause to make these amendments effective upon publication in the *Federal Register* so that parties to all program access complaint proceedings, including those currently pending before the Commission, can benefit from these new rules. With respect to new Section 76.1003(i) regarding ADR, we note this procedure is voluntary and requires both parties to agree to engage in alternative dispute resolution; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*. With respect to new Section 76.1003(k) regarding protective orders, we note that this rule enhances existing safeguards provided under our form protective order, and will facilitate and expedite the review of privileged and/or confidential documents; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*.

[582] The Commission will publish a document in the *Federal Register* announcing the effective date of the amendment to Section 76.1003(e)(1) and new Section 76.1003(j).

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 07-29

American Cable Association
AT&T Inc.
Broadband Service Providers Association
Cablevision Systems Corp.
Carol L. Carlson
Coalition for Competitive Access to Content
Comcast Corporation
DIRECTV, Inc.
EATEL Video, LLC
EchoStar Satellite L.L.C.
National Cable & Telecommunications Association
National Rural Telecommunications Cooperative
National Telecommunications Cooperative Association
Office of Advocacy of the United States Small Business Administration
Organization for the Promotion and Advancement of Small Telecommunications Companies and the Independent Telephone and Telecommunications Alliance (Joint Comments)
Qwest Communications International Inc.
RCN Telecom Services, Inc.
The Rural Independent Competitive Alliance
SureWest Communications
The United States Telecom Association
Verizon

Reply Comments filed in MB Docket No. 07-29

American Cable Association
AT&T Inc.
Cablevision Systems Corp.
Coalition for Competitive Access to Content
Comcast Corporation
Consumer Federation of America, Consumers Union, Free Press, Media Access Project, and Communications Workers of America (Joint Reply Comments)
DIRECTV, Inc.
EchoStar Satellite L.L.C.
National Cable & Telecommunications Association
Qwest Communications International Inc.
RCN Telecom Services, Inc.
SureWest Communications
Time Warner Inc.
Verizon
The Walt Disney Company, CBS Corporation, Fox Entertainment Group, and NBC Universal (Joint Reply Comments)

APPENDIX B

Response to Cablevision Regarding Analysis in *Adelphia Order*

1. This Appendix provides further details of the review of Cablevision's critique of the Commission's RSN analysis in Appendix D of the *Adelphia Order*.[1] In the *Adelphia Order*, the Commission conducted a statistical (regression) analysis that found, after holding other relevant factors constant, that non-cable MVPDs had significantly lower market shares in markets where they were denied access to a RSN.[2] The regression analysis was part of a larger "uniform price increase strategy" analysis, designed to assess the impact of changes in regional market shares for Comcast and Time Warner on their incentives to raise RSN prices. The resulting calculations indicate that in some markets the largest applicant would have an incentive to raise RSN prices by more than five percent. This result formed part of the rationale for imposing certain conditions on the Adelphia applicants.

2. One parameter needed for the uniform price increase strategy analysis is the amount by which subscribership to a competitive MVPD would fall if that MVPD were to choose not to carry the RSN. Cablevision asserts that "the analysis confuses harm to competitors with harm to consumers . . . . Importantly, it tells us nothing about the effects of exclusive RSN deals on consumer welfare."[3] Neither the regression analysis nor the larger uniform price increase strategy analysis in which it is embedded purport to provide a numerical estimate of the strategy's impact on consumer welfare. However, the results of the analysis inform the Commission's predictive judgment, based on the mode of analysis employed in the Department of Justice ("DOJ") Merger Guidelines, that withholding RSNs from rival MVPDs would reduce MVPD competition and harm customers. Therefore, we do not agree that the regression analysis tells us nothing about the effects of exclusive RSN deals on consumer welfare.

3. In order to assess Cablevision's critique of the regression analysis itself, it is necessary to describe the analysis briefly. Commission staff specified and estimated a model to explain DBS penetration (the actual dependent variable is the "alternative delivery system" penetration, from Nielsen Media Research) as a function of "cable prices, cable system characteristics, population demographics, and DBS program offerings."[4] The cable system data came from the 2005 FCC Cable Price Survey and the demographic data for the county within which each cable system in the sample is located came from the U.S. Census.

4. The regression equation contains dummy variables for the three markets, Philadelphia, San Diego, and Charlotte, in which local RSNs were not made available to DBS. The estimated coefficients on these dummy variables are negative in all three cases and statistically significant in the case of Philadelphia and San Diego. The magnitude of the coefficients indicates that in Philadelphia, DBS penetration is 40.5% lower than it would be if the local RSN were available to DBS. The corresponding figure for San Diego is 33.3%.

5. Most of Cablevision's criticisms of the regression model address the claimed omission of certain possibly relevant explanatory variables. However, some of the variables claimed to be left out

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[1] *See* Cablevision Comments, Appendix B at 24-25.

[2] *See Adelphia Order*, 21 FCC Rcd at 8341-50, Appendix D.

[3] *See* Cablevision Comments, Appendix B at 24-25.

[4] *See Adelphia Order*, 21 FCC Rcd at 8344, Appendix D, ¶ 14.

were, in fact, included. Moreover, omission of an explanatory variable does not necessarily indicate that the coefficients on the relevant dummy variables are inaccurate or biased. In other words, the impact on DBS penetration of withholding an RSN could still be measured accurately, even if not every relevant explanatory variable were included in the regression. Nevertheless, after reviewing some specific Cablevision comments, we report on supplementary regression results that explicitly include variables that the Cablevision critique claims were inappropriately omitted.

6. As an initial matter, we examine some specific assertions made by Cablevision:

> "The analysis simply tests whether DBS penetration is different in Philadelphia, San Diego, and Charlotte than it is elsewhere, but not why it is different in those places.
>
> Results of the FCC analysis show that the control variables do not explain all of the differences between Philadelphia, San Diego, and the rest of the nation, but provides no reason to believe that the lack of access to an RSN is the key factor.
>
> Many variables likely to be important in explaining DBS penetration are omitted, such as the extent of local marketing of DBS, the quality of local DBS service, terrain and foliage coverage, and the extent and local marketing of cable, among others.
>
> …the model should include some information about the number and quality of RSNs in an area…It is not possible to capture all the relevant information related to RSNs in a dichotomous variable indicating whether there is an exclusive RSN in a region. Moreover, the analysis should control for city or regional fixed effects, not include a few and claim that tests the effects of RSN access."[5]

7. In fact, the analysis is designed to hold constant other relevant determinants of variations in DBS penetration. If it does so, then the coefficients on the dummy variables for the three cities would capture the effect of RSN exclusivity. Moreover, the fact that the control variables do not explain all of the variation in DBS penetration does not mean that the coefficients on the dummy variables are biased. Additionally, omitted variables would affect the coefficients of the dummy variables only if they are correlated with any included variables, and Cablevision does not assert any such correlation.[6] Moreover, some of the variables Cablevision claims are omitted are actually included. The variable reflecting carriage of local broadcast signals is a prominent indicator of "the quality of local DBS service." Other than that, DBS channel lineups do not differ across markets. Furthermore, the latitude variable takes account, albeit indirectly, of terrain variations. The "look angle" for a satellite dish is greater at lower latitudes, which means that it takes a greater degree of terrain roughness to obscure the view of the satellite.

8. One consequence of differences across markets in the number and quality of RSNs is differences in demand for these networks. The Commission analysis does, in fact, control for systematic differences across markets in demand for RSNs via the "key DMA" variable, which takes on a value of one when the relevant cable system is in a DMA that is home to a professional sports team from one of the four major sports leagues. The presumption is that demand for RSNs is higher in these home markets

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5 *See* Cablevision Comments, Appendix B at 24-25.

6 *See generally* Wooldridge, Jeffrey M. *Econometric Analysis of Cross Section and Panel Data* (Cambridge, MA: MIT Press) 2002 at 50-51, 61-70.

than in others. To the extent that the primary determinant of RSN demand and quality is availability of local professional teams from the major sports leagues, the key issues are whether there is a local team or teams, and whether the team or teams is available to DBS subscribers as well as cable subscribers. By and large, all RSNs (even in markets with more than one RSN splitting carriage of local major league teams) are available to DBS in markets outside the three specified. Although Cablevision provides no specific suggestion on how to characterize RSN "quality" more precisely, we attempt to account for it in the new regression results reported below.

9. Cablevision also asserts that "even if one believes the model is valid, the results on the Charlotte dummy variable contradict the FCC's interpretation."[7] In fact, the coefficient on the Charlotte dummy is negative, which is in accord with, rather than contradictory to, the hypothesis. However, the estimated coefficient does not meet standard benchmarks for statistical significance. The Charlotte RSN carried one relevant professional team and, as pointed out in the text of the *Adelphia Order*: "[T]he Charlotte Bobcats are a relatively new team and do not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs."[8] Accordingly, this result may be one specific manifestation of the quality differences that Cablevision speaks of in general terms. Moreover, unlike many other cases, the Charlotte RSN was carried on the digital tier, which made it unusually expensive to acquire.[9]

10. Cablevision's suggestion that a full-blown "fixed effects" model would be appropriate is reasonable in principle.[10] However, Cablevision fails to note that, to estimate such a model, it would be necessary to have data for a time period or periods when the RSNs were made available to all MVPDs in addition to data for a time period or periods when the RSNs were withheld from rival MVPDs. Data for the former situation are not available, so it was not possible to estimate a full-blown "fixed effects" model. However, it is possible to estimate the *Adelphia Order* Appendix D model with some additional variables added.

11. The results reported below address Cablevision's claim that the regression equation reported in Appendix D of the *Adelphia* Order suffers from omitted variable bias, which could call into question the results of that regression. Our analysis indicates that this claim is unfounded. Indeed, adding the variables suggested by Cablevision to our previous regressions appears to strengthen the conclusions in Appendix D of the *Adelphia Order*. Our analysis indicates that Appendix D of the *Adelphia Order* may have been unduly conservative in its assessment of the reduction in DBS subscribership in DMAs in which DBS operators are denied RSNs.

12. Cablevision claims that we did not adjust for the quality of the RSN in our regression, instead treating all RSNs as equal. We know of no available direct measure of RSN quality, but we did, in fact, include a rough proxy for RSN quality: "key DMA," a dummy variable which equals one if there is a professional sports team in a given DMA, zero otherwise. This would adjust the regression if demand is different for multichannel video services in DMAs that contain professional sports teams. Nonetheless, in response to the critique we include in our analysis below an additional variable: a count of professional sports teams in each DMA, excluding National Football League teams, which generally do not appear on RSNs. Instead of just one or zero, this count ranges from zero to seven, and potentially could represent a

[7] *See* Cablevision Comments, Appendix B at 24-25.

[8] *Adelphia Order*, 21 FCC Rcd at 8271-72, ¶ 151.

[9] *See* http://www.nba.com/bobcats/news/release_cset_preview_041202.html

[10] *Adelphia Order*, 21 FCC Rcd at 8271-72, ¶ 151.

supply-side "potential quality" measure for RSNs. As shown in the results below, this variable does not alter our previous conclusions and, in fact, strengthens them.

13. Cablevision also claims that adjusting for the roughness of terrain will explain variations in DBS subscribership, and the lack of a variable measuring terrain biases our results. Again, we previously included a rough proxy for terrain, the natural log of latitude. Since DBS satellites are located over the southern United States, as latitude increases moving northward, DBS dishes must be pointed closer to the horizon. Presumably, the closer the dish is pointed to the horizon, the more likely terrain will interfere with the required clear view of DBS satellites. As expected, this variable in our previous regression shows a negative sign, although it was not statistically significant.[11] Nonetheless, we included several new variables that measure more directly the effect of terrain. First, we include the natural log of the standard deviation of the elevation in the county, which is a measure of roughness of terrain.[12] The log of latitude remains, and we also include an interactive variable between the log of standard deviation of elevation and the log of latitude, which will capture the combined effect of roughness of terrain and dish angle. Again, addition of these variables only strengthens the conclusions reached in the *Adelphia Order*.

14. As before, we follow Wise and Duwadi (2005) in the specification of a model to examine DBS penetration and the variables that affect it. The model estimates the impact of cable prices, cable system characteristics, population demographics, and DBS program offerings on the percent of television households subscribing to DBS service. Each observation in our data corresponds to an incumbent cable system responding to the 2005 FCC Cable Price Survey.[13] The survey provides information on the service rates and characteristics of the responding cable operators' cable systems. We use an estimate from Nielsen Media Research of the number of households subscribing to "alternative delivery systems" in a county to construct our measure of DBS penetration. Demographic variables are also available at the county level from the 2000 Census.

15. We use a partial log-linear functional form where the dependent and continuous independent variables are transformed using the natural logarithm.[14] We estimate variations of the following equation:

$$\text{LN DBS PENETRATION} = B_0 + B_1 \cdot \text{LN CABLE PRICE} + B_2 \cdot \text{LN CABLE CHANNELS} + B_3 \cdot \text{PHILLY} + B_4 \cdot \text{SANDIEGO} + B_5 \cdot \text{CHARLOTTE} + B_6 \cdot \text{KEYDMA} + B_7 \cdot \text{TEAM COUNT (or KEYDMA)} + B_8 \cdot \text{DBSOVERAIR} + B_9 \cdot \text{CABLECOMP} + B_{10} \cdot \text{HDTV} + B_{11} \cdot \text{INTERNET} + B_{12} \cdot \text{LN INCOME} + B_{13} \cdot \text{LN MULTIDWELL} + B_{14} \cdot \text{LN LATITUDE} + B_{15} \cdot \text{LN STANDARD DEVIATION ELEVATION} + B_{16} \cdot \text{LN STANDARD DEVIATION ELEVATION*LATITUDE} + \varepsilon$$

[11] The model in the *Adelphia Order* was based on Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005) (Wise and Duwadi (2005)), which showed a negative and statistically significant log of latitude coefficient.

[12] The source of the added terrain variables is the SRTM Global Digital Elevation Model provided by ESRI, Inc., which is derived from the NASA/NGA Shuttle Radar Topography Mission (SRTM) from the U.S. Geological Survey's EROS Data Center. The resolution is 3 arc seconds (90 meters).

[13] We eliminate observations from cable systems that do not offer digital programming. Two more observations are lost when adding variables measuring terrain roughness discussed below.

[14] This transformation allows the coefficients on the continuous variables to be interpreted as elasticities.

Where:

LN DBS PENETRATION is the log of the percent of television households subscribing to an "alternative delivery system" in the county containing the responding cable system;

LN CABLE PRICE is the log of the recurring monthly charge for the basic tier plus the next additional package of channels offered by the responding cable system;[15]

LN CABLE CHANNELS is the log of the number of cable channels offered by the responding cable system on the basic tier plus the next additional package of channels;

PHILLY is an indicator variable taking on the value of 1 when the responding cable system is located in the Philadelphia DMA;

SANDIEGO is an indicator variable taking on the value of 1 when the responding cable system is located in the San Diego DMA;

CHARLOTTE is an indicator variable taking on the value of 1 when the responding cable system is located in the Charlotte DMA;

TEAM COUNT is a count of professional sports teams by DMA, excluding National Football League teams.

KEYDMA is an indicator variable taking on the value of 1 when the responding cable system is located in a DMA that is home to a professional sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, or the National Hockey League;

DBSOVERAIR is an indicator variable taking on the value of 1 when one or both DBS operators offer local broadcast signals in the DMA where the responding cable system is located;

CABLECOMP is an indicator variable taking on the value of 1 when the cable system competes against a second cable operator;

HDTV is an indicator variable taking on the value of 1 when the responding cable system offers one or more channels in high-definition format;

INTERNET is an indicator variable taking on the value of 1 when the responding cable system offers high-speed Internet access;

LN INCOME is the log of the median household income in the county containing the responding system;

LN MULTIDWELL is the log of the percent of households in multiple dwelling units ("MDUs") in the county containing the responding system;[16]

[15] More than 90% of subscribers purchase at least the first two tiers of services. In addition, most regional sports networks are carried on one of these two tiers.

[16] We define a multiple dwelling unit as one that contains two or more housing units in one building.

LN LATITUDE is the log of the latitude of the county containing the responding system.

LN STANDARD DEVIATION ELEVATION is the log of the standard deviation of the elevation of the county containing the responding system; and

LN STANDARD DEVIATION ELEVATION*LATITUDE is an interaction variable between LN STANDARD DEVIATION ELEVATION and LN LATITUDE.

16. We use instrumental variables to account for possible endogeneity of the cable price and the number of cable channels. We use the natural logs of system capacity (MHz) and the number of subscribers served nationally by the cable system owner, as well as the number of networks with which the cable system owner is vertically integrated, as excluded instruments. We perform estimation using the generalized method of moments.

17. The first regression differs from the *Adelphia Order* only in adding TEAM COUNT.

Table 1

DBS Penetration and RSN Access

Independent Variables	**Dependent Variable: LN DBS PENETRATION** **Coefficient**	**z-statistic**
LN CABLE PRICE	2.11*	2.15
LN CABLE CHANNELS	-1.11*	-2.61
PHILLY	-0.53*	-6.59
SANDIEGO	-0.47*	-5.52
CHARLOTTE	-0.21	-1.45
KEYDMA	0.21*	3.29
TEAM COUNT	-0.03	-1.94
DBSOVERAIR	-0.09	-1.43
CABLECOMP	0.27	1.18
HDTV	-0.12	-1.53
INTERNET	-0.06	-0.52
LN INCOME	-0.29*	-2.44
LN MULTIDWELL	-0.37*	-10.45
LN LATITUDE	-0.01	-0.03
CONSTANT	-0.73	-0.26
Observations	676	
Centered R-Squared	0.26	
F-Statistic (14, 661)	40.57	
Hansen J Statistic	27.22	

** - significant at 95% confidence level*

Most coefficients change only slightly in terms of statistical significance or magnitude as compared to the results reported in Appendix D of the *Adelphia Order*. The magnitude of both PHILLY and SANDIEGO rise, and both are still highly statistically significant. CHARLOTTE drops slightly, but remains not statistically significant. In sum, the addition of TEAM COUNT only strengthens the approach taken in the *Adelphia Order*.

18. The second regression differs from the *Adelphia Order* by adding TEAM COUNT, LN STANDARD DEVIATION ELEVATION and LN STANDARD DEVIATION ELEVATION*LATITUDE. Thus, it addresses all of the omitted variable claims.

Table 2

DBS Penetration and RSN Access

Independent Variables	**Dependent Variable: LN DBS PENETRATION**	
	Coefficient	**z-statistic**
LN CABLE PRICE	1.06	1.22
LN CABLE CHANNELS	-0.72*	-1.96
PHILLY	-0.51*	-6.59
SANDIEGO	-0.87*	-9.37
CHARLOTTE	-0.22	-1.64
KEYDMA	0.23*	4.13
TEAM COUNT	-0.04*	-3.03
DBSOVERAIR	-0.09	-1.59
CABLECOMP	0.04	0.18
HDTV	-0.11	-1.57
INTERNET	-0.02	-0.21
LN INCOME	-0.21	-1.89
LN MULTIDWELL	-0.39*	-11.53
LN LATITUDE	0.38	0.91
LN STANDARD DEVIATION ELEVATION	1.01*	2.59
LN STANDARD DEVIATION ELEVATION*LATITUDE	-0.25*	-2.31
CONSTANT	-1.08	-0.34
Observations	674	
Centered R-Squared	0.42	
F-Statistic (16, 657)	81.41	
Hansen J Statistic	30.65	

** - significant at 95% confidence level*

This model also does not change the conclusions in the *Adelphia Order* and, if anything, strengthens them. The magnitude of the PHILLY and CHARLOTTE coefficients are virtually the same (although CHARLOTTE is closer to statistical significance), but the magnitude of SANDIEGO is more than double. This indicates that we may, in fact, have underestimated the effect of denial of RSNs on DBS subscribership.

19. *Conclusion*. In summary, while the added variables may add some precision and understanding to the dynamics behind DBS subscription, they do not alter the conclusions of our earlier analysis. The addition or subtraction of variables will yield different magnitudes for the coefficients measuring the effect on DBS penetration in areas in which DBS is unable to carry RSNs, but whatever the mix of variables, the negative effect on DBS penetration of RSN withholding remains clear. Adding variables to our equation, in response to suggestions made by Cablevision, actually appears to strengthen our results and confirms that the analytic approach in the *Adelphia Order* was a reasonable one.

APPENDIX C

Impact of Clustering on Withholding Strategy and Analysis of Profitability of Withholding Strategy

1. This appendix (i) examines changes in the magnitude of clustering since the *2002 Extension Order;* (ii) assesses the impact of clustering on the incentives of cable operators to withhold regional programming from rivals; and (iii) assesses the incentives of cable operators to withhold national programming from rivals. The analysis focuses on the two largest MSOs, Comcast and Time Warner, both of which are vertically integrated.

I. Data

2. The analysis draws on two sets of data from Warren Publishing ("Warren") pertaining to cable subscribership and homes passed, with each set designed as a census of all cable systems in the U.S. The first dataset contains data from January 2003, and the second dataset contains data from July 2007.[1] From each one, we extracted the data for all systems owned by Time Warner and by Comcast. Once the data for each cable operator were extracted, systems were sorted according to the respective cable operator, and then were sorted again by Designated Market Area (DMA). For each cable operator, we counted all of the subscriber and homes passed (HP) data for each DMA served. Each of these figures was entered into a spreadsheet showing the total number of homes passed and subscribers that each cable operator had in each DMA for each time period. A column was then added to each spreadsheet to provide the Nielsen television household (TVHH) count for each DMA for the relevant time period.

3. Since Warren generates its datasets through polling of each system, and because the responses are voluntary, each of the Warren datasets contained missing or incomplete information. At times, the subscriber data presented exceeded Nielsen TVHH counts, and more often, the HP data presented exceeded Nielsen's statistic for the number of TVHH in the DMA, or subscribers exceeded HP. In order to resolve these inconsistencies, we obtained datasets from another source for each of the two time periods examined. The additional data are from Centris, which uses random sampling to generate estimates of each MSO's ownership of cable subscribers in each DMA.[2]

4. The following describes the cases in which we attempted adjustments to the Warren data and the adjustments actually made.

Problem #1. Subscribers > Nielsen TVHH.[3] In these cases, where possible, we replaced the subscriber figure according to formula #1.

Problem #2. HP > Nielsen TVHH.[4] In these cases, where possible, we replaced the HP figure according to formula #2.

[1] Warren Publishing, *CABLE: General Information-January 2003*; Warren Publishing, *CABLE: General Information-July 2007*.

[2] CENTRISBridge. We preferred Warren as a primary data source because it is based on polling of, or at least an attempt to poll, all cable systems rather than sampling.

[3] Two cases: TW2007-49 Buffalo; Comcast2007-38 West Palm.

Problem #3. HP< Subs.[5] In these cases, where possible, we replaced the HP figure according to formula #2.

Problem #4. Subscriber data, HP data, or both were deemed insufficient because of lack of systems reporting in that DMA.[6] In these cases, where possible, we replaced the Warren subscriber statistic according to formula #1, and we replaced the HP figure according to formula #2.

The data adjustment formulas are as follows:

Formula #1. Subscribers = Centris-reported subscribers (16 cases)

Formula #2. HP = (Centris subscriber count for cable operator/Centris subscriber count for entire DMA)*Nielsen TVHH (79 cases).[7]

5. After making the modifications described, it became evident that some of these modifications had created new inconsistencies. We applied formula #1 or formula #2 as appropriate (6 cases).[8] This process left 12 cases that required additional attention, because there was not sufficient Centris data available to apply our adjustment formulas.

In four cases, we used an adaptation of Formula #2 as follows:

(Continued from previous page)
[4] Sixteen cases: TW2003-71 Honolulu, 161 Palm Springs, 192 Laredo; Comcast+AT&T2003-3 Chicago, 59 Richmond; TW2007-49 Buffalo, 58 Dayton, 72 Honolulu, 78 Rochester, 79 Syracuse, 157 Birmingham, 187 Laredo, 203 Zanesville; Comcast2007-11 Detroit, 18 Denver, 182 Charlottesville.

[5] TW2003-31 Milwaukee, 44 Buffalo, 51 Jacksonville, 78 Omaha, 80 Syracuse, 91 Burlington, 103 Greenville, 167 Utica, 173 Elmira, 199 Mankato; Comcast+AT&T2003-21 Pittsburgh, 32 Cincinnati, 35 Greenville, 39 West Palm, 50 Louisville,53 Wilkes Barre, 83 Huntsville, 87 South Bend, 107 Tallahassee, 169 Missoula; Comcast w/o AT&T2003- 35 Greenville, 50 Louisville, 83 Huntsville, 107 Tallhassee; TW2007-19 Orlando; Comcast2007-7Boston, 23 Portland, 25 Indianapolis, 38 West Palm, 48 Louisville, 61 Richmond, 64 Ft. Myers, 65 Charleston, 66 Flint, 84 Huntsville, 88 South Bend, 98 Johnstown, 148 Salisbury, 165 Hattiesburg, 181 Harrisonburg.

[6]Forty-one cases (six both, nine subs only, twenty-six HP only): Both Subs and HP missing: TW 2003-87 South Bend, TW2007-40 Birmingham, 44 Memphis, 109 Springfield, 132 Columbus,176 Watertown. Subs only missing: Comcast+AT&T2003-122 Macon, 127 Yakima; Comcast w/o AT&T2003-122 Macon; Comcast2007-74 Portland, 77 Spokane, 106 Ft. Wayne, 120 Eugene, 166 Clarksburg, 185 Meridian. HP only missing: TW2003-20 Orlando, 21 Pittsburgh, 60 Tulsa, 162 Gainesville; Comcast+AT&T2003-40 Birmingham, 118 Fargo, 119 Santa Barbara, 180 Bowling Green; Comcast w/o AT&T-17 Miami, 18 Denver, 53 Wilkes Barre, 59 Richmond, 111 Lansing, 119 Santa Barbara, 180 Bowling Green; TW2007-22 Pittsburgh, 35 Salt Lake, 38 West Palm, 110 Reno, 184 Greenwood; Comcast2007-40 Birmingham, 42 Norfolk, 51 Providence, 122 Obispo, 135 Monroe, 183 Bowling Green.

[7] Note that Formula #2 assumes that TVHH is a rough proxy for total HP. Based on nationwide homes passed figures, this is not an unreasonable assumption. *See infra* note 14. In DMAs where Time Warner or Comcast was identified as the only provider in that DMA, the figure is exactly equal to the number of Nielsen TVHH in that DMA. Where Time Warner or Comcast is a provider among two or more providers, we thus allocated HP according to their share of subscribers in that DMA.

[8] Six cases: Comcast+AT&T2003-122 Macon; Comcast w/o AT&T2003-17 Miami, 53 Wilkes Barre, 59 Richmond, 111 Lansing, 122 Macon;

Formula #3: HP = (Warren subscriber count for cable operator/Warren subscriber count for entire DMA)*Nielsen TVHH.[9]

6. Of the remaining cases, we eliminated seven from our dataset on the grounds that the presence of the MSO in question was apparently very small,[10] and we eliminated one case, even though the presence of the MSO in question was not small, because we did not have enough additional data to correct properly the apparent inconsistency in the data.[11]

II. Analysis of Increase in Clustering from 2002 to 2007

7. The above-described procedures have generated a set of data that reasonably represents the state of ownership of cable systems by Comcast and Time Warner as of January 2003[12] and July 2007. It is also important to note that the *2002 Extension Order* was adopted prior to Comcast's acquisition of AT&T Broadband. For this reason, the following results include separate calculations for Comcast with and without AT&T Broadband.

- For Comcast with AT&T Broadband, the share of homes passed in total television households increased in 61 markets, decreased in 57 markets, and remained the same in 90 markets.

- For Comcast without AT&T Broadband, the share of homes passed in total television households increased in 73 markets, decreased in 25 markets, and remained the same in 110 markets.[13]

- For Time Warner, the share of homes passed in total television households increased in 60 markets, decreased in 40 markets, and stayed the same in 105 markets.[14]

8. Focusing on markets that saw the largest changes in the ratio of homes passed to television households by a single MSO:

- Comcast with AT&T Broadband had 23 markets with an increase of at least 20 percentage points and only 16 with a decrease of at least that magnitude.

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[9] Four cases: TW2003-20 Orlando, 199 Mankato; Comcast+AT&T2003-169 Missoula; TW2007-19 Orlando.

[10] Seven cases: TW2003-87 South Bend, 162 Gainesville; Comcast+AT&T2003-118 Fargo, 127 Yakima; TW2007-25 Indianapolis, 38 West Palm, 88 South Bend.

[11] Warren Publishing indicates that in 2003, Time Warner had three systems in the Jacksonville, Brunswick DMA. All three systems reported subscribers, but only two systems reported homes passed. As a result, we accounted for <u>more subscribers than homes passed</u>. In order to resolve this inconsistency in the data (Problem #3 - HP<Subs), we first applied Formula #2 to the DMA statistics. Application of the formula, however, also resulted in HP<Subs. Subsequently, the same result was obtained after application of Formula #3. This was the only DMA in which the data could not be resolved using the corrective methodology described herein..

[12] The earliest data available are for January 2003, six months after the adoption of the *2002 Extension Order*.

[13] Data limitations made it impossible to complete the calculation for two DMAs.

[14] Data limitations made it impossible to complete the calculation for five DMAs.

- Comcast without AT&T Broadband had 43 markets with an increase of at least 20 percentage points and two with a decrease of at least that magnitude.

- Time Warner had 18 markets with an increase of at least 20 percentage points and 14 with a decrease of at least that magnitude.

9. Focusing on markets in which the ratio of homes passed to total television households is the largest:

- The number of markets in which Comcast's share is 70 percent or more increased from 18 to 30 (with AT&T Broadband) and from seven to 30 (without AT&T Broadband).

- The number of markets in which Time Warner's share is 70 percent or more dropped from 24 to 23.

III. Analysis of Profitability of Withholding of Regional Programming

10. The "critical value" analysis is designed to examine the costs and benefits to a vertically integrated satellite cable programmer (VISCP) of withholding an RSN from non-cable MVPDs in the local market. This is sometimes referred to as the "cable only" distribution strategy. The critical value is the minimum share of subscribers to non-cable MVPDs in the market that would have to switch to cable in response to withholding in order to make the strategy profitable. The critical value calculations are based on current DMA market structure, specifically the shares of television households (TVHH) passed by Comcast and Time Warner, financial data for Comcast and Time Warner, and the 2006 average profile of RSNs (*i.e.*, average affiliation fees and network advertising revenues per subscriber per month).

11. The calculations are based on publicly-available data and are designed to establish that, under plausible conditions, it would be profitable for a VISCP to withhold a RSN from all non-cable MVPDs in the DMA. It is assumed that some share of non-cable MVPD subscribers would switch to cable in response to withholding and that these subscribers are in the same areas of the market served by the VISCP's cable affiliate and in areas served by other cable operators. Moreover, it is assumed that all TVHH in the market are passed by cable.[15] The homes passed data for Comcast and Time Warner are taken directly from the Warren Publishing database; it is assumed that all other TVHH are passed by other cable operators. The calculations also assume that, prior to withholding, all MVPD subscribers receive the RSN.

The following notation is used to define the critical value:

V	the critical value
TVHH	number of television households in the DMA
HPASSED	the number of TVHH in the DMA passed by the VISCP's cable affiliate
ADS	the share of TVHH in the DMA that subscribes to non-cable MVPDs

[15] This is a reasonable assumption. National data from Kagan Research LLC indicate that more than 100 percent of "occupied homes" are passed by cable. *See* NCTA 2007 Industry Overview, p. 7, http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf (last visited August 14, 2007). The assumption that all TVHH are passed by cable was also made in the uniform price increase analysis in the *Adelphia Order*. *See Adelphia Order*, 21 FCC Rcd at 8347, Appendix D ¶ 22.

P	the monthly per-subscriber profit that the VISCP's cable affiliate earns on an additional subscriber (net of amortized set-top box ("STB") cost)
FEE	the monthly per-subscriber affiliation fee charged by the VISCP (prior to withholding)
AD	the monthly per-subscriber network advertising revenues earned by the RSN

12. The critical value is the share of non-cable MVPD subscribers that would switch to cable in response to withholding. It is calculated by comparing the losses and gains associated with withholding.

The loss from withholding is: (ADS*TVHH) * (AD + FEE). This is the total number of MVPD subscribers in the DMA that do *not* subscribe to cable multiplied by the loss per subscriber of advertising revenue and affiliate fee.

The gain from withholding is:

[**V** *(ADS*TVHH)] *
[((HPASSED/TVHH)*(P + AD)) + (1-(HPASSED/TVHH))* (AD + FEE)]

The expression on the first line is the number of non-cable MVPD subscribers who chose to switch to cable. The expression on the second line is the average gain to the VISCP and its cable affiliate per subscriber who switches. It is a weighted average of the gain from a subscriber who switches to the VISCP and its cable affiliate (marginal profits from a new subscriber plus regained network advertising revenue) and the gain from a subscriber who switches to another cable operator in the market (regained affiliate fee and network advertising revenue). In order for withholding to be profitable, gains have to be equal to or greater than losses. Setting the term for gains equal to the term for losses makes it possible to solve for V, the critical value. Specifically, the critical value is:

(AD + FEE)/((HPASSED/TVHH)* (P+AD)) + ((1-(HPASSED/TVHH)* (AD + FEE))[16]

13. As noted above, HPASSED data come from Warren Publishing.[17] TVHH figures by DMA are available from Nielsen.[18] Average RSN revenue profiles (AD and FEE) are available from Kagan Research LLC. For 2006, FEE was $1.44 and AD was $0.45.[19] The current analysis examines the profitability of withholding a regional network with this particular revenue profile and thus would apply to a network with some other type of content as long as the revenue profile is the same. Marginal profit per subscriber figures were compiled by FCC staff for two major vertically integrated MSOs—Time Warner and Comcast. In each case, average revenue per subscriber per month and average variable cost

[16] This formula is a modified version of the one used in the *Hughes Order*. *See Hughes Order*, 19 FCC Rcd at 643, Appendix D n.60.

[17] Warren Publishing, *CABLE: General Information-January 2003*; Warren Publishing, *CABLE: General Information-July 2007*.

[18] *See* U.S. TV Household Estimates – Ranked by Households, http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "U.S. TV Households by Market") (last visited Aug. 2, 2007).

[19] *See* Kagan Research LLC, *Media Sports Business* at 4 (March 30, 2007). The calculations also use the specific profile for Comcast SportsNet Philadelphia (AD is $0.40 and FEE is $1.97) from this source.

per subscriber per month were obtained from company public financial reports (Annual Report and Form 10K). For each company, an upper bound and a lower bound profit figure was computed. The upper bound figure is based on the assumption that those subscribers that switch to the VISCP's cable affiliate purchase voice, video, and data services in the same proportion as do the firm's existing video subscribers. The lower bound figure is based on the assumption that those subscribers that switch to the VISCP's cable affiliate purchase only video services, but in the same proportion as the firm's existing video subscribers.

14. The analysis requires the marginal profit when a cable operator acquires an additional customer due to the lack of programming on a competing MVPD. We use measures of the cable operator's average revenue per subscriber to estimate the additional revenue that the firm would gain. To estimate the cost of serving the additional customer, we use the cable operator's costs net of its infrastructure and other overhead costs since serving an additional customer would not require building additional cable plant or expanding the size of the operator's headquarters staff. The profit calculations are made for the year 2006. Year-end total revenues are derived from the 10-K or Annual Report.[20] From this, total expensed costs associated with the same year-end period (represented in the 10-K or Annual Report as either total "cost of revenues" or total "operating expenses.") are subtracted from Revenues.[21] This result, divided by the total number of subscribers served,[22] and then divided by 12 yields the marginal profit (gross of subscriber acquisition cost) per subscriber per month for the MSOs entire cable operation. The marginal profit per subscriber is closely related to the degree of competition within the MVPD market. As such, the results of the analysis will vary based upon the amount of competition. When competition is vigorous in the market, marginal profit per subscriber will be low and the incumbent cable operator will be less likely to find it profitable to withhold programming. When competition in the MVPD market is weak, marginal profit per subscriber will be high and it will generally be profitable to withhold programming. Accordingly, the calculation incorporates the current degree of competition in the MVPD market. One empirical indicator of the degree of competition is the cable share of MVPD households.

15. The lower bound of the marginal profit estimate is derived from a calculation of marginal profit based on the revenues generated by the video services provided by the MSO. This assumes that new subscribers never purchase voice and data services, and purchase video services in the same proportion as existing customers. Segmented revenues figures are commonly broken out by cable MSO's in the "Segment Operating Results" section of the 10-K or Annual Report.[23] The elements of video-related revenues typically consist of subscription revenues and advertising revenues.[24] Since operating expenses are typically not broken out by type of service (or at least not all of the elements of operating expenses), a proportional rate must be derived from total revenues and total expenses to approximate the video portion of operating expenses. Depending on the method of reporting employed by each MSO, the application of the proportion is in some instances applied to the total operating expenses. In instances

[20] Comcast, Annual Report for the Year Ended Dec. 31, 2006, at 28 ("*Comcast 2006 Annual Report*"). Time Warner, Form 10-K for the Year-Ended Dec. 31, 2006, at 101 ("*Time Warner 2006 10-K*").

[21] *Comcast 2006 Annual Report* at 28; at 101. The cost category "Sales General & Administrative" is not subtracted from Revenues because these expenses apply to the entire corporation and cannot be matched with a particular service or group of subscribers.

[22] *Comcast 2006 Annual Report* at 29; *Time Warner 2006 10-K* at 71, 76.

[23] *Comcast 2006 Annual Report* at 28; *Time Warner 2006 10-K* at 71, 76.

[24] *Comcast 2006 Annual Report* at 28. *Time Warner 2006 10-K* at 71, 76.

where specific video-related costs (*e.g.*, programming costs) are broken out by the MSO, the proportion is simply applied to the other categories of expenses that that are not easily segmented across video and data services.[25] Subtracting a proportional estimate of operating expenses from video-related revenues and dividing by total subscribers served[26] and by 12 yields an estimate of marginal profit per subscriber per month (gross of subscriber acquisition cost)for the video-related services of the entire corporation.

16. In order to conduct the critical value analysis, it is necessary to compute marginal profit net of amortized subscriber acquisition costs. The data on subscriber acquisition costs come from an analyst report on Comcast.[27] The report assumes that each new subscriber requires two digital set-top boxes and that those who subscribe to advanced digital services (*i.e.*, HD and/or DVR) have one advanced and one standard set-top box. The report assigns a cost of $400 to advanced set-top boxes and a cost of $120 to standard set-top boxes. The report estimates that $45 per new subscriber of installation costs is amortized. It provides a weighted average subscriber acquisition cost of $278 and an average subscriber life of 45 months over which to amortize subscriber acquisition costs.[28] The calculations assume a discount rate of 10 percent.[29] The monthly per-subscriber profit that the VISCP's cable affiliate earns on an additional subscriber (net of amortized STB cost) is calculated as average revenue per subscriber per month less average variable cost per subscriber per month less monthly amortized subscriber acquisition cost.[30]

17. Critical value calculations are made for every DMA in which either Comcast or Time Warner had subscribers as of 2007. The results will vary with the share of homes passed by the VISCP's cable affiliate. If the percentage of homes passed is very low, then a high percentage of subscribers would need to shift in order to make withholding of the prototype network profitable. When the percentage of homes passed is very high, then a lower percentage of subscribers would need to shift in order to make withholding of the prototype network profitable. In order to decide on plausible critical values, we examine the most prominent example of RSN withholding, Comcast SportsNet Philadelphia. Using the average RSN revenue profile and Comcast's value for HPASSED/TVHH in the Philadelphia DMA, the critical values for Philadelphia (where we know that withholding is profitable) are 5.45% for

[25] *Comcast 2006 Annual Report* at 28. *Time Warner 2006 10-K* at 71, 76. As with the upper bound calculation, the cost category "Sales General &Administrative" are not part of the calculation for the lower bound.

[26] *Comcast 2006 Annual Report* at 29; *Time Warner 2006 10-K* at 71, 76.

[27] *See* Bear Stearns, *Comcast Corp.: Reframing the 'CAPEX Issue;' 2Q07 Preview* (July 19, 2007), Exhibit 4 and associated notes ("*Bear Stearns Report*").

[28] The analyst report combines the data used herein with a figure it calls "Scalable Infrastructure CAPEX" and other data to calculate internal rates of return. As noted in note 9 to the report, they indicate that this figure is not necessarily a variable cost. They include it in their calculations for their purposes, but it is not included in the current subscriber acquisition cost calculations.

[29] *See Hughes Order*, 19 FCC Rcd at 635, Appendix D, ¶ 4.

[30] In the absence of a separate source for Time Warner's subscriber acquisition costs, we use the Comcast figures for Time Warner as well. It should also be noted that the subscriber acquisition costs are based on a weighted average across all (Comcast) subscribers. This is exactly what is needed for the upper bound profitability calculations, which assume that new subscribers switching to the VISCP's cable affiliate purchase voice, video, and data services in the same proportion as existing subscribers. It is not ideal for the lower bound calculations, but data were not available to disaggregate the video subscribers from the total to make a separate estimate of subscriber acquisition costs for video subscribers only. *See Bear Stearns Report.* The fact that, of the two non-video categories, one has a subscriber acquisition cost below the weighted average and one above suggests that using the weighted average is not unreasonable, although it may be slightly low for the lower bound profitability calculations.

the upper bound profitability and 8.40% for the lower bound profitability. We calculate the minimum amount of switching that must occur for the withholding of Comcast SportsNet Philadelphia to be a profitable endeavor for Comcast. This calculation uses the high and low estimates for the marginal profit earned by Comcast and the actual 2006 revenue profile of Comcast SportsNet Philadelphia. If Comcast's marginal profit is high, then at least 6.81% of competing MVPDs customers must have switched to Comcast for the withholding to be profitable. If Comcast's marginal profit is low, then at least 10.49% of competing MVPDs customers must have switched to Comcast for the withholding to be profitable. This gives us a range of the minimum subscriber shifts that must be occurring in Philadelphia for the endeavor to be profitable. This is an estimate of the critical value in Philadelphia in regards to Comcast SportsNet.

18. Applying these cutoff values for V to the calculated switching values yields the following results. For Comcast, using the average RSN profile, withholding would be profitable in 26 DMAs.[31] These are the DMAs in which Comcast's share of TVHH passed is greater than 73.7%; 13 of the 26 are among the top 50 DMAs in size. Using the Comcast SportsNet Philadelphia profile, withholding would be profitable in an additional 13 DMAs, of which 8 are in the top 50.[32] At this threshold, the Comcast share of TVHH passed is at least 60.4%.

19. With regard to Time Warner, it is appropriate to apply the cutoffs derived from the upper bound profitability calculations to the upper bound calculated critical values and the cutoffs derived from the lower bound profitability calculations to the lower bound critical values, since the upper and lower bound calculations embody different assumptions about the behavior of those who switch to cable. For the upper bound calculations, there are five DMAs in which it would be profitable for Time Warner to withhold an RSN of average revenue profile using the lower (5.46%) criterion and an additional 15 DMAs using the higher (6.83%) criterion.[33] Seven of the 20 DMAs in question are among the top 50. For the lower bound Time Warner calculations, there are no markets in which withholding would be profitable using the lower (8.44%) criterion and 13 DMAs in which withholding would be profitable using the upper (10.54%) criterion. Four of the 13 are in the top 50 DMAs.

20. *Conclusion*. The critical value calculations are forward-looking in nature. Although based on imperfect data, they nonetheless provide a basis for concluding that, absent the program access exclusivity prohibition, withholding of a RSN (or any other regional network with similar revenue profile) would be profitable in a significant number of DMAs. The calculations suggest that if, through clustering, Time Warner, Comcast, or any other VISCP attained a sufficiently high share of television households passed by its cable systems in a particular DMA, withholding could be profitable there as well.

IV. Analysis of Profitability of Withholding of National Programming

21. It is also possible to calculate the minimum fraction of non-cable subscribers that must shift to cable in order to make withholding profitable. The method used to calculate these critical values is the same as that for regional programming, and the profitability estimates used are the same. The Warren data permit us to calculate the national share of cable homes passed by Comcast (34.08%) and Time Warner (21.89%). We retain the assumption that all homes nationwide are passed by cable. Data

[31] The data indicates that Comcast provides service to at least part of 97 DMAs.

[32] The nature of the critical value formula is such that, for Comcast, any market that meets a cutoff for the upper bound profitability level would also meet it for the lower bound profitability level.

[33] The data indicates that Time Warner provides service to at least part of 89 DMAs.

on affiliation fees and network advertising revenue per subscriber per month are available from Kagan Research LLC.[34] Calculations were made for 11 popular networks, on the assumption that they were owned by Comcast or by Time Warner. For Comcast, the critical values of the 11 networks ranged from 1.9 to 28.3 percent for the upper bound profitability scenario and from 3 to 40 percent for the lower bound profitability scenario. For Time Warner, the upper bound profitability scenario critical value range was 3.9 to 45.8 percent, while the lower bound profitability scenario critical value range was 6.7 to 63.6 percent for the 11 networks.

[34] Kagan Research, LLC, *Economics of Basic Cable Networks 2007*, at 36-40, 60-62, 80-82; Kagan Research, LLC, Media Trends 2006, at 66-67; Kagan Research LLC, *Cable Program Investor*, Jun. 29, 2007, at 10.

APPENDIX D

Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c)(6) to read as follows:

§76.1002 Specific Unfair Practices Prohibited.

* * * * *

(c) ***

(6) **Sunset provision.** The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

3. Section 76.1003 is amended by adding a sentence to the end of paragraph (e)(1) and by adding paragraphs (i), (j) and (k) to read as follows:

§76.1003 Program access proceedings.

* * * * *

(e) *Answer*. (1) * * * To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

* * * * *

(i) *Alternative dispute resolution*. Within 20 days of the close of the pleading cycle, the parties to the program access dispute may voluntarily engage in alternative dispute resolution, including commercial arbitration. The Commission will suspend action on the complaint if both parties agree to use alternative dispute resolution.

(j) *Discovery*. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(k) *Protective Orders*. In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of program access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

APPENDIX E

Standard Protective Order and Declaration For Use in Section 628 Program Access Proceedings

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	Docket No. ________________
[Name of Proceeding]	)	

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective

Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

6. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

a. Subject to Paragraph 7.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 7.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 7.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

8. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

9. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

10. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 12 are not removed.

13. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of)

[Name of Proceeding]) Docket No.________________

I, ____________________________, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) __________________________

(printed name) _____________________

(representing) ______________________

(title) _____________________________

(employer) _________________________

(address) __________________________

(phone) ___________________________

(date) _____________________________

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA")[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* ("*NPRM*").[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the document. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[4]

A. Need for, and Objectives of, the Proposed Rules

2. *Overview*. The *NPRM* considers Commission action with respect to seven issues. First, the Commission is considering whether it can establish a procedure that would shorten the term of the five-year extension of the exclusive contract prohibition if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a Designated Market Area.[5] Second, the Commission is contemplating the extension of its program access rules to terrestrially delivered cable-affiliated programmers in order to facilitate competition in the video distribution market.[6] Third, the Commission is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a Direct Broadcast Satellite ("DBS") provider.[7] Fourth, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude the practice of programmers to require multichannel video programming distributors ("MVPDs") to purchase and carry undesired programming in return for the ability to purchase and carry desired programming.[8] The *NPRM* considers whether to instead require programmers to offer each of their programming services on a stand-alone basis to all MVPDs. Fifth, the *NPRM* contemplates action to address concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content.[9] The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects.[10] First, the *NPRM* is considering whether to establish a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of a complaint.[11] Second, the

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603.

[3] *See* 5 U.S.C. § 603(a).

[4] *See id.*

[5] *See NPRM* ¶ 114.

[6] *See id.* ¶ 115-117.

[7] *See id.* ¶ 118.

[8] *See id*. ¶¶ 119-132.

[9] *See id*. ¶ 133.

[10] *See id*. ¶¶ 134-137.

[11] *See id*. ¶ 134.

NPRM contemplates revising the Commission's program access complaint procedures by requiring parties to submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process.[12] Each of these issues is discussed in further detail below.

3. *Procedure for Shortening Term of Extension of Exclusive Contract Prohibition*. Section 628(c)(2)(D) of the Communications Act prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest.[13] In MB Docket 07-29, the Commission decided to extend this prohibition for five years, until October 5, 2012. In light of the five-year extension of the exclusivity ban, the *NPRM* considers whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e.*, October 5, 2009), a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. The *NPRM* contemplates what this penetration level should be, whether two years or some other time frame is the appropriate period of time, and whether a market-by-market analysis is appropriate as both a legal and policy matter.

4. *Terrestrially Delivered Cable-Affiliated Programming*. Congress enacted the program access provisions contained in Section 628 of the Communications Act of 1934, as amended, as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[14] The program access provisions are intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing MVPDs to "satellite cable programming" and "satellite broadcast programming."[15] The Commission has previously concluded that terrestrially delivered programming (*i.e.*, programming transmitted or retransmitted by satellite for direct reception by cable operators) is not covered by the definitions of "satellite cable programming" and "satellite broadcast programming."[16] Thus, terrestrially delivered programming is not subject to the program access provisions. The Commission has previously found that cable operators have withheld terrestrially delivered cable-affiliated programming from competitive MVPDs and that this has resulted in a material adverse impact on competition in the video distribution market.[17] To remedy this concern, the *NPRM*

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[12] *See id*. ¶¶ 135-137.

[13] 47 U.S.C. § 548(c)(2)(D).

[14] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[15] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

[16] *See DIRECTV, Inc. v. Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807, ¶ 12 (2000); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12158, ¶ 73 (2002).

[17] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8271, ¶ 149 (2006) ("*Adelphia Order*").

considers whether to extend the program access provisions to all terrestrially delivered cable-affiliated programming pursuant to various provisions of the Communications Act, such as Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706.[18] The Commission also seeks information as to whether cable operators, again with anti-competitive results, are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules.

5. *Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming*. The *NPRM* is considering whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. To the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming.[19] Moreover, Section 628(j) of the Communications Act provides that any provision of Section 628, including the exclusive contract prohibition in Section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming.[20] Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). The *NPRM* is considering whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.

6. *Tying*. Various MVPDs have raised concerns regarding the practice of some programmers to require MVPDs to purchase and carry undesired programming in return for the right to carry desired programming, referred to as "tying." When presented with a tying arrangement, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. The *NPRM* explains that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases. Given the problems associated with such tying arrangements, the *NPRM* is contemplating whether it may be appropriate for the Commission to preclude them and to instead require each programming service to be offered on a stand-alone basis to all MVPDs. The *NPRM* considers precluding the tying practices of broadcasters, satellite cable programmers, terrestrially delivered cable-affiliated programmers, and programmers that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent programmer.

7. *Concerns Raised by Small and Rural MVPDs*. Small and rural MVPDs have raised concerns regarding obstacles they face in trying to obtain access to programming which impede

[18] *See* 47 U.S.C. § 154(i); 47 U.S.C. § 201(b); 47 U.S.C. § 303(r); 47 U.S.C. § 521(6); 47 U.S.C. § 532(g); 47 U.S.C. § 536(a); 47 U.S.C. § 548(b); 47 U.S.C. § 157 nt.

[19] *See Order* ¶ 76.

[20] *See supra* note 377; *see also* 47 U.S.C. § 548(j).

competition in the video distribution marketplace. These obstacles include (i) restrictions on the use of shared headends for receiving content; (ii) requiring small and rural MVPDs to enter into mandatory non-disclosure agreements with programmers; (iii) requiring small and rural MVPDs to provide programmers with advertising slots; and (iv) mandating unwarranted security requirements. The *NPRM* contemplates Commission action to address these practices.

8. *Modification of Program Access Complaint Procedures*. The *NPRM* also contemplates revising the Commission's program access complaint procedures in two respects. First, the *NPRM* contemplates adding an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. The *NPRM* is considering whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best "final offer" proposal for the rates, terms or conditions under review. The *NPRM* considers whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint. Second, the *NPRM* is considering whether to allow complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. In the *NPRM,* the Commission agrees that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints. The *NPRM* thus contemplates whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. The *NPRM* considers whether complainants should be required to formally request such relief from the Commission and establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay. The *NPRM* also considers whether, as part of a showing of irreparable harm, complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. The *NPRM* further contemplates whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. The *NPRM* considers the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. The *NPRM* also contemplates whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. The *NPRM* considers whether the length of the stay should be entirely discretionary. The *NPRM* also considers whether the Commission should include, as part of its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

9. In the *NPRM*, the Commission seeks comment on the foregoing issues. In particular, the *NPRM* invites comment on issues that may impact small entities, including MVPDs and programmers.

B. Legal Basis

10. The authority for the action proposed in the rulemaking is contained in Section 4(i), 303, and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 548.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[24]

12. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111).[25] The 2007 NAISC defines this category as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[26] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[27] According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for

[21] 5 U.S.C. § 603(b)(3).

[22] 5 U.S.C. § 601(6).

[23] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[24] 15 U.S.C. § 632.

[25] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

[26] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[27] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

the entire year.[28] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees.[29] Thus, under this size standard, the majority of firms can be considered small.

13. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[30] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[31] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[32] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[33] Thus, under this size standard, the majority of firms can be considered small.

14. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[34] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[35] In addition,

[28] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC Code 517110; 2002 NAISC Code 517510; 2002 NAISC Code 518111) (issued November 2005).

[29] *Id*.

[30] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[31] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[32] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

[33] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[34] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[35] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[36] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[37] Thus, under this standard, most cable systems are small.

15. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[38] There are approximately 65.4 million cable subscribers in the United States today.[39] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[40] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[41] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[42] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

16. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[43] This definition provides that a small entity is one with $13.5 million or less in annual receipts.[44] Currently, three operators provide DBS

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[36] 47 C.F.R. § 76.901(c).

[37] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[38] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[39] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[40] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[41] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[42] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[43] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[44] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[45] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[46] and EchoStar Communications Corporation ("EchoStar"),[47] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[48] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

17. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts.[49] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[50] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[51] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

18. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes

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[45] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[46] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[47] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id*.

[48] *See id*. at 2540, ¶ 73 .

[49] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[50] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

[51] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

all such companies generating $13.5 million or less in revenue annually.[52] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[53] The Commission has no information regarding the annual revenue of the four C-Band distributors.

19. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[54] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).[55] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[56]

20. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[57] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[58] In the MDS auction, 67 bidders won 493 licenses.[59] Of the 67 auction winners, 61 claimed

[52] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[53] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

[54] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

[55] *See id.*

[56] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

[57] 47 C.F.R. § 21.961(b)(1) (2002).

[58] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

[59] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[60] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[61] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

21. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[62] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

22. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[63] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[64] The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,[65] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[66] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three

[60] Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less). *See* 13 C.F.R. § 121.201 (2007 NAICS code 517910).

[61] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[62] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[63] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[64] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[65] The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

[66] *See LMDS Order,* 12 FCC Rcd at 12545.

calendar years.[67] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[68] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

23. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[69] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[70] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[71] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[72] Among BSPs, however, those operating under the OVS framework are in the minority.[73] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[74] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

24. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for

[67] *Id.*

[68] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[69] *See* 47 U.S.C. § 573.

[70] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[71] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

[72] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[73] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id*. at 2548-49, ¶ 88 n.336.

[74] *See id*. at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id*. The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

transmission to viewers."[75] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[76] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[77] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[78] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

25. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[79] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[80] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

26. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[81] According to Commission data,[82] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

27. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size

[75] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[76] 13 C.F.R. § 121.201 (NAICS code 515210).

[77] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[78] *Id*. An additional 40 firms had annual receipts of $25 million or more.

[79] 15 U.S.C. § 632.

[80] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[81] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[82] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (February 2007) ("Trends in Telephone Service"). This source uses data that are current as of October 20, 2005.

standard, such a business is small if it has 1,500 or fewer employees.[83] According to Commission data,[84] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

28. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[85] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[86] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[87] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

29. *Television Broadcasting.* The SBA defines a television broadcast station as a small business if such station has no more than $13.0 million in annual receipts.[88] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[89] The

[83] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[84] *See* Trends in Telephone Service at Table 5.3.

[85] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[86] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

[87] U S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

[88] *See* 13 C.F.R. § 121.201 (2007 NAICS Code 515120).

[89] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting"; http://www.census.gov/naics/2007/def/ND515120.HTM#N515120, This category description provides further that "these establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." *Id*. Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, 2007 NAICS code 512110 (http://www.census.gov/naics/2007/def/ND512110.HTM#N512110); Motion Picture and Video Distribution, 2007 NAICS Code 512120 (http://www.census.gov/naics/2007/def/
(continued….)

Commission has estimated the number of licensed commercial television stations to be 1,376.[90] According to Commission staff review of the BIA Financial Network, MAPro Television Database ("BIA") on March 30, 2007, approximately 986 of an estimated 1,374 commercial television stations[91] (or approximately 72 percent) have revenues of $13.5 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[92] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed NCE television stations to be 380.[93] The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

30. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

D. Description of Proposed Reporting, Recordkeeping and other Compliance Requirements

31. The rules ultimately adopted as a result of this *NPRM* may contain new or modified information collections. We anticipate that none of the changes would result in an increase to the reporting and recordkeeping requirements of small entities. We invite small entities to comment in response to the *NPRM*.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

32. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

(Continued from previous page)
ND512120.HTM#N512120); Teleproduction and Other Post-Production Services, 2007 NAICS Code 512191 (http://www.census.gov/naics/2007/def/ND512191.HTM#N512191); and Other Motion Picture and Video Industries, 2007 NAICS Code 512199 (http://www.census.gov/naics/2007/def/ ND512199.HTM#N512199).

[90] *See* News Release, "Broadcast Station Totals as of December 31, 2006," 2007 WL 221575 (dated Jan. 26, 2007) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/mb/.

[91] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra* note 81; however, we are using BIA's estimate for purposes of this revenue comparison.

[92] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[93] *See Broadcast Station Totals*, *supra* note 81.

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[94] First, regarding the establishment of a procedure that would shorten the five-year term of the extension of the exclusive contract prohibition, the Commission may choose to establish such a procedure or, in the alternative, it may not choose to do so. Second, regarding the extension of the program access rules to terrestrially delivered cable-affiliated programmers, the Commission may choose to extend these rules to terrestrially delivered cable-affiliated programmers or, in the alternative, it may choose not to extend these rules to such programmers. Third, regarding expansion of the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, the Commission may choose to extend the exclusive contract prohibition to apply to such non-cable-affiliated programming or, in the alternative, it may choose not to extend the exclusive contract prohibition to such programming. Fourth, regarding the practice of programmers to engage in tying of desired with undesired programming, the Commission may choose to preclude all such tying arrangements or, in the alternative, it may choose not to preclude any such arrangements or, in the alternative, it may choose to preclude only certain tying arrangements. Fifth, with respect to concerns raised by small and rural MVPDs regarding conditions imposed by programmers for access to content, the Commission may choose to take action to address some or all of these concerns or, in the alternative, it may choose not to take action to address these concerns. Sixth, regarding the establishment of a process whereby a program access complainant may seek a temporary stay of any proposed changes to its existing programming contract pending resolution of the complaint, the Commission may establish such a process or, in the alternative, it may choose not to establish such a process. Seventh, regarding the requirement that parties submit to the Commission, when requested, "final offer" proposals as part of the remedy phase of the complaint process, the Commission may adopt such a requirement or, in the alternative, it may choose not to adopt such a requirement. We invite comment on the options the Commission is considering, or alternatives thereto as referenced above, and on any other alternatives commenters may wish to propose for the purpose of minimizing significant economic impact on smaller entities.

F. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

None.

[94] 5 U.S.C. § 603(c).

APPENDIX G

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-29 (hereinafter referred to as the *Notice)*.[2] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This present Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Rules Adopted

2. *Background*. Congress enacted the program access provisions contained in Section 628 of the Communications Act of 1934, as amended, as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 628 is intended to encourage entry into the multichannel video programming distribution ("MVPD") market by existing or potential competitors to traditional cable operators by requiring cable operators to make available to MVPDs the programming necessary for them to become viable competitors.[4] Specifically, this proceeding involves (i) Section 628(c)(2)(D), which prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest;[5] and (ii) the Commission's procedures for resolving program access disputes under Section 628.

3. *Extension of Exclusive Contract Prohibition*. Section 628(c)(5) of the Communications Act directed that the exclusive contract prohibition in Section 628(c)(2)(D) would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[6] In October 2001, the Commission issued a *Notice of Proposed Rulemaking* seeking comment on whether the exclusive contract prohibition continued to be "necessary" pursuant to the criteria set forth in Section 628(c)(5).[7] In June 2002, the Commission issued a decision concluding that the exclusive contract prohibition continued to be "necessary" pursuant to

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[1] *See* 5 U.S.C. § 603. The RFA has been amended by the *Contract With America Advancement Act of 1996*, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). *See* 5 U.S.C. § 601 et. seq. Title II of the CWAAA is the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA").

[2] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007) (the "*Notice*").

[3] *See* 5 U.S.C. § 604. We note that, because our action with respect to the exclusive contract prohibition in Section 628(c)(2)(D) retains the status quo in this context, we could have certified our action under the RFA. *See generally* 5 U.S.C. § 605.

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 47 U.S.C. § 548(c)(2)(D).

[6] 47 U.S.C. § 548(c)(5).

[7] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001).

these criteria and therefore extended the prohibition for five years (*i.e*., through October 5, 2007).[8] The Commission also provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[9] We issued the *Notice* in February 2007 to initiate this review.[10]

4. The *Order* herein adopted retains for five years (until October 5, 2012) the prohibition on exclusive contracts for satellite cable programming and satellite broadcast programming between vertically integrated programming vendors and cable operators as set forth in Section 628(c)(2)(D) of the Communications Act and Section 76.1002(c)(2) of the Commission's rules.

5. In the *Order*, we analyze the changes that have occurred in the video programming and distribution markets since 2002 when we last decided that the exclusive contract prohibition continued to be necessary to preserve and protect competition. While the markets for both programming and distribution reflect some pro-competitive trends since 2002, we conclude that these developments are not sufficient to allow us to decide that the exclusive contract prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming. We then assess whether vertically integrated programmers today retain both the ability and incentive to favor their affiliated cable operators over nonaffiliated MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected. We conclude that vertically integrated programmers retain this ability and incentive. Thus, we find that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming. We therefore extend the exclusive contract prohibition for five years subject to review during the last year of this extension period.

6. In the *Order*, we also reject proposals presented by some commenters to narrow the exclusive contract prohibition based on the status of the programming, the cable operator, or the competitive MVPD. We find that narrowing the prohibition in this manner is not supported by the Communications Act and would not promote competition. We also reject proposals presented by some commenters to expand the exclusive contract prohibition to non-cable-affiliated programming and unaffiliated programming. We find that expanding the prohibition is not supported by the Communications Act and that there is no record evidence to support such an expansion of the prohibition. We also considered the possibility of allowing the exclusive contract prohibition to sunset. Because we conclude that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the video distribution market, we decide not to allow the exclusive contract prohibition to sunset. The decision to retain the exclusive contract prohibition will facilitate competition in the video distribution market, thereby benefiting various competitive MVPDs including those that are smaller entities. Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities.

[8] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124 (2002) ("*2002 Extension Order*"); *see also* 47 C.F.R. § 76.1002(c)(6).

[9] *See 2002 Extension Order,* 17 FCC Rcd at 12161, ¶ 80.

[10] *See Notice*, 22 FCC Rcd 4252 (2007).

7. *Modification of Program Access Complaint Procedures*. The Commission's rules provide that any MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint at the Commission.[11] In the *Notice*, we considered whether and how our procedures for resolving program access disputes under Section 628 should be modified.[12] Among other things, we considered (i) whether specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of these disputes; (ii) whether our rules governing discovery and protection of confidential information are adequate; and (iii) whether the Commission should adopt alternative procedures or remedies such as mandatory standstill agreements and arbitration.[13]

8. In the *Order*, to facilitate the resolution of program access complaints, we modify our procedures for resolving such complaints by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

9. In its Comments on the IRFA, the Office of Advocacy of the United States Small Business Administration ("SBA Office of Advocacy") claims that the Commission's IRFA in this proceeding was inadequate because it allegedly (i) did not contain a complete economic analysis of the impact of a decision to allow the exclusive contract prohibition to sunset on the small entities listed in the IRFA; (ii) failed to consider alternatives to allowing the prohibition to sunset that will achieve the Commission's goals while minimizing burdens on small entities; and (iii) failed to collect data on the impact of a sunset of the prohibition on small businesses that offer video programming to customers, such as sports bars, smalls entities in the hospitality industry, and certain housing developments.[14] The SBA Office of Advocacy Office argues that without access to video content demanded by subscribers, small providers of video services will not be able to compete in the MVPD market.[15] Accordingly, the SBA Office of Advocacy urges a three-year extension of the exclusive contract prohibition.[16] Although not filed specifically in response to the IRFA, comments were filed in response to the *Notice* by small competitive MVPDs and small cable operators that urged the Commission to retain the exclusive contract

[11] 47 C.F.R. §§ 76.7 and 76.1003.

[12] *See Notice*, 22 FCC Rcd at 4259-4260, ¶¶ 13-16.

[13] *See id*.

[14] *See* SBA Office of Advocacy Comments at 4-7.

[15] *See id*. at 4.

[16] *See id*. at 6.

prohibition and to revise the procedures for resolving program access complaints. These commenters argued that they will be unable to viably compete in the video distribution market if denied access to vertically integrated programming. Moreover, they argued that the current program access complaint process is costly and time-consuming such that it makes it impracticable for small carriers to pursue filing a program access complaint. Our response to all such comments is contained in paragraph 31 *infra*.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

10. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[17] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[18] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[19] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[20]\

11. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111).[21] The 2007 NAISC defines this category as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[22] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[23] According to

[17] 5 U.S.C. § 603(b)(3).

[18] 5 U.S.C. § 601(6).

[19] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[20] 15 U.S.C. § 632.

[21] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

[22] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[23] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for the entire year.[24] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees.[25] Thus, under this size standard, the majority of firms can be considered small.

12. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[26] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[27] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[28] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[29] Thus, under this size standard, the majority of firms can be considered small.

13. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[30] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[31] In addition,

[24] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC Code 517110; 2002 NAISC Code 517510; 2002 NAISC Code 518111) (issued November 2005).

[25] *Id*.

[26] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[27] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[28] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

[29] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[30] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[31] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at (continued….)

under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[32] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[33] Thus, under this standard, most cable systems are small.

14. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[34] There are approximately 65.4 million cable subscribers in the United States today.[35] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[36] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[37] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[38] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

15. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[39] This definition provides that a

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7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[32] 47 C.F.R. § 76.901(c).

[33] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[34] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[35] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[36] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[37] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[38] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[39] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program (continued….)

small entity is one with $13.5 million or less in annual receipts.[40] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[41] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[42] and EchoStar Communications Corporation ("EchoStar"),[43] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[44] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

16. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts.[45] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[46] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[47] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators.

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Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[40] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[41] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[42] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[43] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id*.

[44] *See id*. at 2540, ¶ 73 .

[45] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[46] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

[47] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

17. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually.[48] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[49] The Commission has no information regarding the annual revenue of the four C-Band distributors.

18. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[50] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).[51] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[52]

19. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[53] This definition of a small entity in the context of MDS auctions has been approved by

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[48] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[49] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

[50] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

[51] *See id.*

[52] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[53] 47 C.F.R. § 21.961(b)(1) (2002).

the SBA.[54] In the MDS auction, 67 bidders won 493 licenses.[55] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[56] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[57] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

20. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[58] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

21. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[59] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[60] The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,[61] the Commission defined a small business as an entity

[54] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

[55] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

[56] Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less). *See* 13 C.F.R. § 121.201 (2007 NAICS code 517910).

[57] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[58] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[59] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[60] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[61] The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

that had annual average gross revenues of less than $40 million in the previous three calendar years.[62] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[63] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[64] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

22. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[65] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[66] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[67] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[68] Among BSPs, however, those operating under the OVS framework are in the minority.[69] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[70] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

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[62] *See LMDS Order,* 12 FCC Rcd at 12545.

[63] *Id.*

[64] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[65] *See* 47 U.S.C. § 573.

[66] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[67] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

[68] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[69] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id*. at 2548-49, ¶ 88 n.336.

[70] *See id*. at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id*. The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

23. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[71] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[72] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[73] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[74] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

24. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[75] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[76] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[77] According to Commission data,[78] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

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[71] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[72] 13 C.F.R. § 121.201 (NAICS code 515210).

[73] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[74] *Id*. An additional 40 firms had annual receipts of $25 million or more.

[75] 15 U.S.C. § 632.

[76] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[77] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[78] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (February 2007) ("Trends in Telephone Service"). This source uses data that are current as of October 20, 2005.

26. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[79] According to Commission data,[80] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

27. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[81] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[82] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[83] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Reporting, Recordkeeping and other Compliance Requirements

28. The rules adopted in the *Report and Order* will impose additional reporting, recordkeeping, and compliance requirements on complainants and respondents in program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; and (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent

[79] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[80] *See* Trends in Telephone Service at Table 5.3.

[81] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[82] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

[83] U S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

29. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[84]

30. The *Notice* invited comment on issues that had the potential to have significant economic impact on some small entities, including (i) whether the exclusive contract prohibition remains necessary to preserve and protect competition in the video distribution market; and (ii) whether and how our procedures for resolving program access disputes under Section 628 should be modified.

31. *Extension of Exclusive Contract Prohibition*. As discussed in Section A, the decision to extend the exclusive contract prohibition for five years will facilitate competition in the video distribution market by ensuring that competitive MVPDs continue to have access to the programming they need to compete. The decision therefore confers benefits upon various competitive MVPDs, including those that are smaller entities. Moreover, the decision avoids the adverse impact to smaller entities that the SBA Office of Advocacy Office and others stated would occur if the prohibition were to sunset.[85] Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities. The alternative of allowing the exclusive contract prohibition to expire would hinder competition in the video distribution market, thereby harming smaller entities.

32. *Modification of Program Access Complaint Procedures*. As discussed in Section A, the decision to modify the procedures for resolving program access disputes will facilitate the processing and resolution of program access complaints, thereby conferring benefits upon smaller entities as well as larger entities that seek to compete in the video distribution marketplace. The alternative of retaining the current program access complaint procedures would not facilitate the resolution of program access complaints and would thereby harm smaller entities that file such complaints.

F. Report to Congress

33. The Commission will send a copy of the *Report and Order and Notice of Proposed Rulemaking*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[86] In addition, the Commission will send a copy of the *Report and Order and Notice of Proposed Rulemaking*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of

[84] 5 U.S.C. § 603(c).

[85] *See* SBA Office of Advocacy Comments at 4-7.

[86] *See* 5 U.S.C. § 801(a)(1)(A).

the *Report and Order and Notice of Proposed Rulemaking* and FRFA (or summaries thereof) will also be published in the Federal Register.[87]

[87] *See* 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 –Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition--Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*

Fostering greater competition in the market for the delivery of multichannel video programming is a primary and long-standing goal of federal communications policy. The program access rules, in particular the prohibition against exclusive contracts, have been instrumental in the growth of viable competitors in the multichannel video programming distribution (MVPD) market. Today we determine that while competition has improved, vertically integrated programmers still have an incentive and ability to favor their affiliated cable operators over competitive MVPDs. The item we adopt today ensures that the competition in this market will continue unabated by retaining the ban on exclusive contracts for vertically integrated programmers for another five years. We therefore make sure that new entrants, in addition to existing players, will continue to have access to critical programming on a nondiscriminatory basis.

Significantly, today's Order makes the program access complaint process more effective by requiring the production of the information necessary to fairly and objectively adjudicate a complaint. This expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints. The availability of programmers' carriage contracts, subject to confidential treatment, is essential for determining whether the programmer is discriminating in price, terms, and conditions.

I am particularly pleased that the Commission has initiated an inquiry into the "tying" practices of programmers. Broadcast and cable programmers routinely tie marquee programming, such as premium channels or regional sports programming, with unwanted or less desirable programming. The Commission seeks comment on whether to end these practices by requiring programmers to offer channels to MVPDs on a stand-alone basis. I believe that if a cable operator only wants one channel, it should not have to take 10 or 20 channels in order to get that one. This is a particularly important issue for small and rural MVPDs and can be a significant obstacle to becoming a viable competitor in the MVPD market. And, I am also concerned about the impact the tying of channels has on consumers who ultimately bear the costs of unwanted programming in the form of higher prices.

Consumers have seen their cable bills double over the last decade at the same time the costs for all other communications services have declined. I take cable operators at their word when they point to the increased cost of programming as the reason for the increased cost borne by consumers. As the Commission begins its examination of these tying arrangements we should bear in mind their impact on consumers in terms of prices and program choice.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, AND CONCURRING IN PART

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

The program access rules are one of the true success stories of the 1992 Cable Act. It is no exaggeration to say that without these rules, the DBS industry as we know it would not exist. Cable operators still have the incentive and ability to discriminate against their competitors regarding access to affiliated programming. Access to cable-affiliated programming was—and continues to be—vital for the growth of a competitive marketplace. New entrants unanimously remind us of this and today the Commission once again unanimously so concludes.

The Commission will look at the exclusivity ban in another five years. I cannot say with certainty what the marketplace will look like in 2012 and whether the exclusivity ban can safely be sunset. I do know it cannot be permitted to do so in 2007. In this regard, I would not have raised the possibility of shortening the term of extension in markets where new entrants are gaining a foothold. It seems to me that this is ***precisely*** the time that an incumbent's incentive to unfairly deny programming to a competitor is most acute.

On the "tying" issue, I would make two points. First, this is primarily about the imbalance in bargaining power when a small MVPD negotiates with large media programming conglomerates. But what this issue is really tied to, like so many other broadcast and cable issues, is media consolidation, and if we fail to view it as such we do serious injustice to the future of our nation's all-important media. There are huge imbalances in the media industry brought on by consolidation, and this Commission needs to understand these imbalances and interconnections and deal with them broadly and effectively. Second, I do not want to broadly inhibit broadcast stations from negotiating for carriage of their multicast signals in exchange for carriage of their main digital signal. Perhaps one day the industry and the Commission will get serious about the public interest obligations of DTV broadcasters and we can be talking about program that really serves the interests of localism, diversity and competition, but precluding negotiations about multicast programming that could ultimately serve the public interest may foreclose options that we may not really want to foreclose.

Finally, while I am generally in favor of ensuring that complainants at the Commission have the information they need to prove their case, I believe that the discovery procedures adopted in this item go too far, and, paradoxically, not far enough. They go too far in establishing a bare "relevance and control" standard for discovery requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes as the parties vie for competitive advantage. On the other hand, I believe the decision does not go far enough because if we are going to liberalize our discovery rules, it ought to apply to contexts beyond program access – such as cases dealing with petitions to deny broadcast station license renewals and transfers. I hope that parties in other disputes file waivers with the Commission asking for liberalized discovery. If sunshine is the best disinfectant, we ought to let the sun shine into every nook and cranny of the Commission.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition Report and Order; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*

Today, I am pleased to support a five-year extension of the Commission's program access rules, specifically the prohibition on exclusive contracts between vertically-integrated satellite cable or broadcast programmers and cable operators. These rules continue to be necessary to not only promote competition and diversity in the distribution of video programming, but to also encourage further investment in the deployment of broadband and other advanced services. Extending the program access rules truly promotes the twin goals of enhanced cable competition and accelerated broadband deployment.

As it turns out, video programming is a killer application that is driving broadband and indeed the entire communications industry. Almost 86 percent of U.S. households get their video programming from a multi-channel video programming distributor (MVPD). Competitive access to video programming, therefore, serves as an important incentive to entrepreneurs, from small businesses to major companies like Verizon, AT&T and Qwest, to enter the video delivery market, make substantial investments to upgrade their networks, and provide consumers with competitive video, voice and data bundled service offerings.

According to the Coalition for Competitive Access to Content, a leading group of competitive video providers, trade associations and consumer groups, video revenues represent between 35 and 55 percent of the total broadband networks revenues. Simply put, "video revenues are essential for the economic success of capital investment" in broadband networks.

I have always supported legally permissible, sustainable means to promote video competition and broadband deployment. Today's decision does just that. It ensures that some, though not all, cable programming will be available to competitive video providers on fair and non-discriminatory terms and conditions. It preserves the program access regime's recognition that product differentiation is a legitimate competitive tool, but the withholding of highly sought programming by a dominant provider leads to barriers of entry that harm competition, the industry and consumers.

As our most recent *Video Competition Report* shows, competition in video distribution and programming markets has intensified, and with the entry of local exchange carriers and other broadband providers, competition in certain areas will truly be robust. According to our *Report,* from 2001 to 2005, the number of cable subscribers, as a share of total MVPD subscribers, has decreased from 77 percent to 69 percent. Commensurately, DBS subscribership has increased from 18 percent to 27 percent. While the competitive presence of DBS has reduced cable's dominance, concentration remains a concern: the top four MVPDs serve 63 percent of all MVPD subscribers, up five percent from 2004. Program access and vertical integration remain major areas of concern.

The *Order* and *Further Notice* address these concerns by extending our program access rules and seeking comment on whether DBS should be subject to the program access rules. While the only vertically-integrated DBS provider currently complies with our access rules pursuant to a merger condition,[1] we should examine whether the rules should apply, especially since our program access regime applies to cable and common carriers.

I believe that video distribution and the resultant revenue stream will continue to drive broadband deployment, which can benefit consumers and the free flow of information beyond the video marketplace. Consumers will benefit not only from more choices, better service and lower prices, but consumers also stand to gain from a more robust exchange in the marketplace of ideas.

I have long expressed grave concerns about the negative effects of media consolidation in this country, and have focused on the problems raised by growing vertical integration of programming and distribution. Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural or political agenda on the public with few alternative choices. I truly believe the benefits of video competition extend beyond the many typical advantages of competition that accrue to consumers, and can actually improve the health of our overall democracy.

One note of concern about this *Order* is the curious turn it takes in revising the discovery process. The Commission decides here it is unreasonable for a respondent not to produce on request all the relevant documents requested by the complainant without a clear discovery standard and a meaningful mediation process. The modification to our existing rules is surprising because, to date, there has not been a single instance where the Commission has requested documents that a party has refused to produce.

The *Order* provides no articulated basis in law, administrative policy or practice to justify such a radical change in Commission policy. The problem with the production of documents has not been a failure of our procedural rules; rather, it has been a failure of will – the Commission's will. It has taken the Commission, on average, seven months to resolve on the merits three out of the 13 complaints filed since December 1998 that the parties did not settle.

The persistent failure of this Commission to act on program access complaints and to request documents in a diligent manner will not be remedied by opening the floodgates to unfettered discovery. Nor will it lead to prompt resolution of access complaints. Indeed, this novel discovery scheme will inevitably frustrate the process and create inefficiency. While I certainly support improving the discovery process to expedite access to relevant documents, the *Order* goes further than warranted by the record in this proceeding.

In sum, the extension of our program access regime is urgently needed to facilitate emerging video competition. I am pleased we are doing so before the current regime expires, and thank my colleagues for working to make many needed improvements in this *Order*.

[1] Within the context of the pending Liberty Media/DIRECTV transaction, the applicants have expressed a willingness to continue compliance, pursuant to merger conditions in the *News/Hughes Memorandum Opinion and Order*. *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004).

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, and Sunset of Exclusive Contract Prohibition Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

One of this Commission's top priorities continues to be the development of a diversity of viewpoints. Such diversity can best be achieved when viewers have access to a variety of programming options. To encourage the development of new programming, and sustain the viability of current programming, we must encourage broadcasters, and cable and satellite operators, to offer viewers a broad array of content and voices.

This item extends the current ban on exclusive contracts between cable operators and satellite cable programming vendors, or satellite broadcast programming vendors, for five years. While much has changed in the world of cable programming, at the current time it is necessary to provide certainty to consumers that they will have access to a variety of necessary programming by banning exclusive contracts. By reviewing this issue again in five years, we allow ourselves the flexibility to respond to further changes in the programming market.

It should be our goal to see all disputes resolved as efficiently and impartially as possible. I look forward to reviewing the comments regarding whether we should make changes to our current process to fulfill these goals.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*

In this Order, we extend the prohibition on exclusive contracts between vertically integrated programming vendors and cable operators for satellite-delivered programming for five years, until October 5, 2012, given the ongoing need to preserve and protect competition and diversity in the distribution of video programming. Although the video distribution marketplace has changed significantly since enactment of the ban, because of increased consolidation in the cable industry and significant regional clustering of cable systems, the ban remains warranted. I am supporting the extension of the exclusivity ban to help further encourage competition in the video distribution market. More competition in a particular market obviates the need for regulation.

With respect to the Notice of Proposed Rulemaking that we launch here to examine negotiations in the marketplace for retransmission consent and programming carriage, I support seeking comment on the questions my colleagues have raised. That said, I want to make clear at the outset that I am concerned about the Commission venturing into what has long been squarely within the realm of the private sector. We should give careful consideration before we regulators take any action that may interfere with private contracts. And as always, we must pay careful attention to Congress' mandates and intentions with respect to these issues. I look forward to reviewing the comments from all interested parties.

Many thanks to the Bureau for the many late nights you have sacrificed on these and other matters.